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INTRODUCTION TO
AMERICAN GOVERNMENT
THE NATIONAL GOVERNMENT
v

THE CENTURY POLITICAL SCIENCE SERIES

Edited by **FREDERIC A. OGG**, *University of Wisconsin*

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PREFACE

This book is identical with the complete eighth edition of our *Introduction to American Government* except only for the omission of two concluding parts (seventeen chapters in all) dealing specifically with the government of states and local areas. Part I provides a broad, over-all picture of the American constitutional and political system, with emphasis on such matters as constitutional origins and foundations, federalism and inter-level relations and trends, citizenship, civil rights, and the instrumentalities of popular control. Part II analyzes the national government, in terms of structural arrangements, functions, powers, processes and procedures, trends, and problems of reorganization and betterment.

When, in 1941, the preceding seventh edition was sent to the printer, people were still talking excitedly on street-corners about the news from Pearl Harbor; and the American government dealt with in that volume, although obviously affected by a year and a half of large-scale defense preparations, was itself of necessity prewar. The present eighth edition affords opportunity to portray this same government under the impact of more than three years of all-out participation in the greatest international conflict in history.

Hardly a chapter in the new edition fails to reflect consequences that have flowed from this latest dominating phase of national experience; and many of the developments recorded will leave an enduring imprint on our federal system, on governmental functions and activities, and especially on the tasks and processes of administration. Nevertheless, the towering fact, which, we trust, will seem to students reading the book as significant—as it has seemed to us in writing it, is the power of an embattled democracy, derided and threatened by totalitarian scoffers, to maintain itself and to go straight on functioning notwithstanding stresses and strains like those of the past few years. In point of fact, it is doubtful whether the war will be found to have imparted permanent slants to our governmental system exceeding in either magnitude or significance those springing from our essentially domestic experience with the depression of the thirties and the resulting New Deal.

And so—while portraying a government at war, and seeking appropriately to emphasize the functions, powers, and procedures incident to a war situation—it becomes possible, even in a “war edition,” to treat of an American political system which has taken war in its stride while

carrying on basically almost as though there had been no war at all. Of course this does not obviate the difficulties arising from the unusual fluidity inherent in wartime conditions--the shifts and changes in powers, instrumentalities, and procedures. But, for one thing, a stability (for the duration, at all events) had been reached by 1944-45 which naturally did not exist in 1942-43; and, anyway, the difference is only one of degree, since a governmental system of the magnitude and dynamic quality of the American can never be depicted except in terms of a flashlight picture caught amid an unending process of change.

A feature of the book has always been copious foot-note addenda, together with selective yet somewhat extended chapter reference lists. Somewhat more than one-fifth of the total space, indeed, is consumed in this way. Obviously, no teacher, and certainly no student, can make use of any very large part of the bibliographical material thus offered. Wide opportunity for selection is, however, afforded; and in any case something may be gained from a kaleidoscopic view (even if only that) of the rich and varied literature of a subject ramifying in almost incredibly numerous directions.

An expression of appreciation is due many users of the book who have continued to give us the benefit of criticisms and suggestions; also numerous government officials and employees who, notwithstanding the pressures of these hectic times, have been generous in supplying needed information and materials.

F.A.O.
P.O.R.

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INTRODUCTION TO
AMERICAN GOVERNMENT
THE NATIONAL GOVERNMENT

CHAPTER I

THE RÔLE OF GOVERNMENT IN THE MODERN WORLD

We are undertaking in this book an analysis and interpretation of the American system of government—its growth, principles, organization, functions, virtues, defects, and challenging problems. Our study, however, will have better perspective if, before turning directly to the subject in hand, we fix attention briefly upon some basic aspects of government in general and throughout the world at large.

Concepts of the Place of Government in the Social Order

* Men everywhere, in every age, have lived under some form of government. But they have held very different opinions as to the amount of control that government ought to be allowed to exert over their affairs. Regarding government as primarily an instrument of arbitrary coercion, the anarchist would dispense with it altogether, except in so far as people might voluntarily pool their energies for common protection. The communist looks ultimately for the day when "political" government will wither away, leaving a classless, stateless world society liberated from controls save those arising from the new economic order which he envisages. The individualist considers government a practical necessity, but would largely confine its activities—aimed chiefly at preventing people from injuring one another—to those of policeman and umpire. The man whom we may perhaps term a "regulationist" looks, rather, upon government as a supreme agency of initiative, control, and service—an active, aggressive, expanding, regulating force, ever seeking new ways not merely of protecting people, but of advancing their economic, social, and moral well-being. The socialist agrees, except that, attributing most of the ills of society to the inequalities of wealth and opportunity characteristic of a capitalist, competitive order, he would do away with private ownership and control of the instrumentalities for producing and distributing goods and would install the state as owner, employer, and manager, thereby turning government into a veritable colossus of managerial authority.¹

Some
widely
differing
views

The anarchist has never had a chance to see his ideas tried in a civilized community, nor is likely to have. The communist has contrived a few sporadic experiments, and aspires to behold his program eventually brought to realization—first of all, presumably, in the Soviet Union.²

Triumph
of the
strong-
govern-
ment
idea

¹ Although stated very broadly, these characterizations indicate perhaps accurately enough for present purposes the wide diversity of opinion on the subject.

² Regarded by communists themselves as at present in only a transitional, socialist stage.

The individualist had his day in the eighteenth and earlier nineteenth centuries, when *laissez faire* was the watchword and in our own country the Jeffersonian political philosophy was dominant. The regulationist came into his own after the Industrial Revolution, and moved from triumph to triumph as present economic and social conditions emerged, with the American "New Deal" as perhaps his topmost achievement. The socialist has seen his plan realized on a large scale only in the Soviet Union, but has had the added satisfaction of observing modern governments everywhere taking over and carrying out his policies in increasingly wide domains of public regulation. With the world-wide political scene confused today as never before by collapsing dictatorships, reëmerging states, and problematical future régimes, one still can affirm the salient fact about government, on the present world stage, to be the mighty and continuing sweep of the regulative authority that it has gained and of the responsibility for service that it has assumed.

How Government Attained Its Present Significance

1. The
contribution
of
inven-
tions

How (in the Western world at all events) did government arrive at its present extraordinary importance? In a sense, the development started on a Sunday morning in 1765 when James Watt, strolling across a Scottish golf-field, was observed to break into a mysterious smile. The upshot of that smile was the steam-engine, and after it the remarkable series of innovations constituting what historians describe as the technological revolution. A world of stage-coaches, sailing ships, and hand-loom became, in time, a world of railroads, oil-burning leviathans, telegraphs, telephones, motor-cars, airplanes, submarines, radio, television, and talking-pictures.

2. Effects
of in-
creasing
eco-
nomic
com-
plexity

These inventions alone would have meant much for government. New instruments were given it with which it could assert authority instantly at any distance, mobilize a nation almost overnight, make war with machine guns, submarines, airplanes, and tanks, and utilize all the processes and techniques of science for whatever purposes it had in hand. From the technological revolution, however, flowed other changes even more momentous. Men could not use the new tools placed in their hands and yet go on living and working as before; and from their adjustments to the situations and opportunities opened up—adjustments known collectively as the *industrial* revolution—sprang a new society. A world of country-dwellers and villagers became a world of teeming urban populations. A world of petty farmers and traders became a world of engineers and machinists, of electricians and aviators, of scientists and technicians, of huge industries and businesses, of professions and crafts undreamt of in any earlier age. And the effect was to open to government not only further avenues to power, but an ever-widening realm of novel obligations, duties, tasks, and challenges.

3. A hundred years ago, the structure of society, even in the most ad-

vanced countries, was relatively simple. In America, it was largely that of a small-farmer, trading population in New England, a planter-slaveholding population in the South, a frontier agricultural population west of the Alleghenies. The growth of numbers, however, together with the impact of railroads, machinery, expanding business, professional organizations, and general mobility of economic life, has in later days produced a social pattern of such intricacy that scholars can spend a lifetime analyzing it without exhausting the problems that it offers. Think for a moment of the social relationships of almost any person of your acquaintance. He has a home and is a member of a family. That alone means much. He belongs to a club or a lodge, perhaps to several. He is a church member, and is affiliated with a political party. There is also his trade union, employers' association, or other professional organization. There are the people to whom he sells, and those from whom he buys. And in most of these directions his tangible and immediate connections are only the initial stages or steps in a ramification of radiating relationships which neither he nor any one else can trace out to their limits. Consider, furthermore, the interrelations, not merely of individuals or of individuals with groups, but of group with group, of interest with interest, which our modern civilization entails—of great businesses and professions, of corporations and trusts, of churches and universities, of philanthropic and propagandist organizations, of federations of labor, of political parties, of other huge social structures, national and international, each competing with or otherwise impinging on the rest. To be sure, most of these relationships are not primarily of a political nature. Yet hardly one of them has failed to be brought within the orbit of public regulation. In the train of steam, electricity, machinery, and science came new industrial procedures needing control, new social relationships calling for adjustment, new forms of crime requiring repression, new activities (like radio broadcasting) needing regulation—new labors and problems at every turn for legislator, administrator, and judge.

But power gained from inventions and from regulatory authority springing from industrial development still falls short of completely explaining the importance that government now has. Time was when the functions of the state hardly extended beyond police, taxation, diplomacy, and defense. To these were gradually added, under the impetus described, a wide variety of controls applying to industrial production, agriculture, trade, transportation, communications, banking, insurance, and what not; and thus to the police state succeeded the regulatory state. To the regulatory state, however, has now succeeded the service state, based on a conception of government as existing not merely to keep the peace and provide defense, nor yet merely (in addition to these things) to order or control economic life in the interest of fairness and opportunity, but to take systematic and continuous measures to promote and protect the education, health, comfort, security, and general well-being

9. The
rise
of the
service
state

of the mass of the people. Implicit in this view of governmental functions are newer ideas of social justice, strongly tinged with humanitarianism; and in pursuance of them we find steadily widening public provision for education on all levels (carried even to such lengths as free lunches for school children), publicly owned and operated utilities, multiplied facilities for public recreation, compulsory sickness and accident insurance, old-age pensions, maternity and child welfare legislation, unemployment insurance—a program of publicly provided protections and benefits pointed up in this country most spectacularly, even though as yet somewhat fragmentarily, in the momentous Social Security Act of 1935. In most of the fields mentioned, private agencies help, but the principal burden falls on government. A major tendency of government in our generation has, indeed, been to become less purely political and more socio-economic.

1 Effects
of depres-
sion and
war

Any list of developments or conditions influencing the rôle of government in later times must certainly include the staggering effects of economic depression and war. Ever since the first World War, government has been carried on in many countries under abnormal conditions growing directly or indirectly out of that devastating chapter of human experience—to which another of far greater frightfulness has lately been added. The new burdens thrown on the agencies and instrumentalities of government, not only by the conflict of 1914-18 itself, but by the war's economic and social aftermath, are incalculable. Hardly, too, were new postwar governments started going, and the tasks of rehabilitation and reconstruction entered upon by governments carrying over from earlier days, before a world-wide economic depression placed government under the necessity of devising and applying remedial measures, raising and spending sums of money unprecedented in peacetime, and fighting with its back to the wall to salvage the broken economic structure, and even to keep people alive. Never was government called upon to do more; never did it, in an equally brief period, launch so many new ventures. Here in the United States, as a recent writer has pointed out, one "may mark McKinley's administration as the end of the period of *laissez faire*—the termination of a narrow and negative conception of government—and the entry of government into all the secular affairs of society."¹ Activities associated with the New Deal in 1933 and after, however—some of them looking merely to immediate relief of distress, others to promoting a broad national recovery, still others to planning and permanently establishing a new social order—raised the work of both national and state governments to levels never before known.² And there were comparable developments in Great Britain, France, and many other countries. The war starting in Europe in 1939 and spreading to the

¹ F. Frankfurter, *The Public and Its Government* (New Haven, 1930), 22-23.

² These developments will be described in various later chapters, notably xxviii-xxxii. Simultaneously, interest in all matters pertaining to government was raised to new heights

United States two years later largely carried the democracies back—in the matter of extension and integration of government controls—to the days of Wilson and Lloyd George and Clemenceau. If fresh accessions of wartime regulative power were less startling than on the earlier occasion, it was only because many of the special powers acquired in 1914-18 had been retained during the interval and needed only to be brought again into play when the new emergency arose. No one living in our own country in these recent times will need to be told how far our effort for victory over our European and Asiatic foes has, nevertheless, carried government out and beyond even the wide reaches of authority and action previously attained.

Government's Ever-Multiplying Functions

He would be a bold man, indeed, who would attempt to draw up a list of the functions and powers that governments in these days may exercise, even under normal peacetime conditions. There are, of course, certain purposes which any and all governments serve—certain tasks which any government worthy of the name performs. Such are the raising of revenue, the maintenance of public order, and (in the case of national governments) the management of foreign relations and of arrangements for defense. Beyond this, nothing is fixed or final. Wherever one goes, one finds government doing things that no one a generation ago would have expected to be assigned or permitted to it—nay more, things of which no one a generation ago had even so much as heard. William McKinley had no notion of government regulation of transportation through the air; Theodore Roosevelt hardly dreamed of a government licensing radio stations, prescribing their hours of operation, and fixing their wavelengths; Herbert Hoover, when in the White House, would hardly have thought it possible that government should tell the farmer how many acres of corn or cotton he might plant. And so it will be in the future. Further technological advances, changing ideas on social and economic subjects, hard experience in a score of directions, will go on bringing into play one new governmental activity after another. To be sure, criticism of this inexorable trend is heard every day. Advocates of "rugged individualism" deplore it; persons who dislike some particular form of regulation, e.g., the anti-trust laws, couch their disapprobation in more or less generalized complaints; "big government" is condemned as bureaucratic, wasteful, and destructive of the people's liberties. But nothing is more quickly learned from the history of government in all modern times than that for every form of activity that grows obsolete and is discarded, two or three new ones find places in the ever-lengthening list. Ground once occupied by government is rarely surrendered.

An irrepressible trend

Such are some of the developments and situations helping to fix the pattern for our study of the government of our own country. Most of the weighty changes referred to have, indeed, taken place since the

american
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United States came into the family of nations, and all of them have powerfully affected the course of our political life. Of necessity, we shall later have much to say about structural forms and about machinery—matters having unusual importance with us because of our federal system and our deference to the principle of separation of powers. But our major interest will be rather in what government does, how it does it, and the extent to which it controls, and is controlled by, the people whom it serves.

our con-
tacts
with gov-
ernment

Let it be emphasized that in studying American government we shall be dealing, not with something remote and theoretical, but with something very real and present—something that surrounds and permeates us even as the air we breathe, and almost as essential to our well-being. Day in and day out, it is government that protects our lives and property, validates and upholds our business dealings, and regulates the conditions under which many of us work. It is government that constructs our highways, builds our school-houses, authorizes us to run our automobiles, keeps us from drinking contaminated water, and protects us from eating impure food. We cannot bring a law-suit, have a deed recorded, inherit an estate, ship a consignment of goods, deposit money in a bank, marry or be divorced—nay, even buy a package of cigarettes—without dealing with government or complying with regulations that government has laid down. Government meets us at birth and records our arrival; government follows us to the end of the journey and issues the permit for our burial; government, indeed, is not content until it has seen such possessions as we leave behind us disposed of in accordance with rules which it has made.

To be sure, there is nothing, except perhaps the weather, which people are more prone to complain of than government. It is of the very essence of government to regulate, to restrain, to control, to govern. But it is human nature to dislike being regulated; to resent being told that one may not park one's car at some especially convenient spot; that one may not put up an apartment house at some location promising unusual profits; that one must pay some new tax. Of course it is all right to find that the city council will not allow cars to be parked so that one cannot get into one's own drive-way; that the health department is quarantining a house where there is a contagious disease; that a policeman has risked his life to prevent a bank robbery. Moreover, let calamity befall—an epidemic, a fire, a flood, a drought, a riot, a depression—and the first thing that the average person does is to call upon government to come to his protection or relief. And if the country is assaulted by a foreign foe, as when Japan loosed her attack at Pearl Harbor in December, 1941, he realizes that government alone can mobilize and direct the national defense. Indeed, if he thinks about the matter at all, he perceives that, in one way or another—in fact, in many ways at one and the same time—he not only needs, but is dependent upon, services which government

alone can render. Sometimes, in truth, people show an almost childlike faith in the ability of government to work miracles.

And here we encounter the first reason why it is worth while for all of us to know something about government—the fact, namely, that we are constantly being controlled by it and constantly dependent upon the services which it renders. Certainly we would want to have a pretty good acquaintance with any individual or group of individuals having even a fraction of such power over us and our affairs. A second reason, too, is that, in a democratic nation like the United States, government is not something external, something imposed upon the people from above, but instead something that the people themselves create, control, and direct. As we shall see, we have in this country a rather complicated governmental system. All of us live under at least three or four different “layers” of government—national, state, county, and perhaps city, to say nothing of minor authorities like those of townships, villages, districts, and what not. But the basic principle upon which all are organized is that to which the founders of our system dedicated it in the beginning, namely, that of popular sovereignty; and the methods of popular control range all the way from the making of constitutions, the election of representatives to sit in legislative bodies, and the choice of executive and judicial officials, to the exercise of vigilance and criticism and the application of pressures through the avenues of public opinion. On all levels of their government, the people get honesty, efficiency, economy, and service in proportion to the civic interest and intelligence which they themselves display—the first requisite of successful democracy being an alert and informed body politic.

Why
study
government!

From this it is not difficult to deduce that the structures, processes, and procedures of government—the ways, too, of directing the work of government into the most useful and wholesome channels—need to be studied by every young man and woman facing the inexorable responsibilities of citizenship. More than such persons are likely to realize, their lives and fortunes will be shaped by what their government is and does; conversely, they have in their power—indeed, it is their solemn duty—to share in determining what their government shall be and do. And upon none does this obligation more obviously rest than upon the youth coming up through our colleges and universities—youth to whom, pre-eminently, will be presented the challenges of an unfolding future.

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2. THE FEDERAL SYSTEM IN TRANSITION

CHAPTER V

FEDERALISM AND THE PRINCIPLE OF NATIONAL SUPREMACY

At a critical juncture in the proceedings of the Philadelphia convention, Alexander Hamilton was heard to exclaim that the states, as obvious impediments to the highly centralized régime which he favored, ought to be abolished. Of course neither Hamilton nor any one else ever really contemplated so drastic a step. On the contrary, if there was one thing above all else that the constitution's makers were bound to do, it was to keep a place in the new system—and a very important one at that—for the states, whose delegates they were, and without whose approval their work might as well never have been done. All of the existing states were carried over from the old constitutional order into the new one, with their names, boundaries, and governments unchanged, and with functions and powers curtailed to be sure, but nevertheless still extensive and basic. Furthermore, the constitution authorized Congress to admit new states to the Union; and from 1791 onwards this power was exercised, as the Southern and Western portions of the country filled with population, until in 1912 the admission of New Mexico and Arizona brought the number to the present forty-eight. Nation
and
states

When, however, the constitution's framers wisely decided upon a national government resting directly upon the people, as the state governments also did, they opened up a question around which much of our later history has revolved, namely, that of the relations legally existing between nation and states. Indeed, out of differences of view upon this matter arose long and bitter disputes which not only tested to the utmost the Supreme Court's capacity for constitutional interpretation, but at one stage plunged the country into devastating civil war. Never yet has the question been answered at all points, nor in truth can it ever be; for in a dynamic, changing society governmental powers simply cannot be defined and circumscribed with such precision and finality as to prevent people from construing them differently in the face of new circumstances and needs. In a country like England, with all public authority concentrated in a single national government,¹ no difficulty arises. But our system is "federal," not "unitary"; except in a few areas such as foreign relations, powers are divided, or distributed, between a national government and forty-eight state governments. And no longer remain of con-

¹ Though of course exercised to a considerable extent through counties, boroughs, and other units of local government.

stitutional phraseology can prevent the division from giving rise to endless doubts and challenges. In America, as elsewhere, federalism has proved an exciting adventure.¹

The
funda-
mental
issue

Historic Problem of the Nature of the Union

Weighty as are many of the questions of national power and state power brought to the fore, for example, by experiences under the New Deal and in World War II, such questions have, after all, related only to the distribution of power within a political order the ultimate basis and nature of which are matters of general agreement. But there was a time when dispute went farther than that. Throughout the first half of our national history, it reached to the very nature of the Union itself. Was the United States, under the constitution, a true and indivisible nation; or was it only a league of sovereign states as before 1789? The question may sound hollow to our ears, but it once stirred the profoundest thought and emotion of American political leaders. That the states were not mere administrative subdivisions, nor yet merely subordinate areas with a limited autonomy conferred by the central government, was conceded by all. They were, as everybody knew, distinct, original, indestructible political entities, with broad surviving inherent powers. But did this mean that they were "sovereign"? Or were their people so merged in a common, superior, national organization that the states also, as political units, had become inextricably embedded in it?

Triumph
of the na-
tionalist
view

Happily, the logic of events has gone far toward clearing up all reasonable doubt on this score. As every student of our history knows, the trend since 1789 has been decidedly in the direction of a strong national government based on an indissoluble union of the states. In a remarkable series of decisions in cases turning on constitutional questions, the Supreme Court, notably during John Marshall's long tenure as chief justice (1801-35), consistently—and with powerful effect—gave its support to the nationalist view. The denial and total extinction of the alleged right of a state to nullify acts of Congress and decisions of federal courts, notwithstanding momentary successes of nullificationists in South Carolina and Georgia in 1829-32, worked to the same end. And—passing over a great number of other contributing factors—the failure of secession in 1860-65, and the general acceptance of the doctrine that a state cannot secede, clinched the victory of nationalism and stamped the union with the quality of permanence which it unmistakably possesses in our own day.

The verdict of history is that the ultimate, *i.e.*, sovereign, authority

¹ The advantages and disadvantages of the federal form of organization are considered at length in J. W. Garner, *Political Science and Government* (New York, 1932), 346-356, 412-422, and J. Bryce, *The American Commonwealth* (4th ed., New York, 1910), Chaps. xxvii-xxviii. Canada, Australia, Switzerland, Brazil, and a few other countries have federal systems; although outside of the United States, the most interesting federal arrangements are those prevailing in the U.S.S.R.

in this country is, not each separate state, nor yet the government of the United States, but the people of the country considered as a whole.¹ In line with the famous assertion of the Declaration of Independence that "governments derive their just powers from the consent of the governed," they—the people—and they only, have the last word in determining the nature of the political system and the powers to be exercised under it.² The thing that is divided is, not sovereignty itself, but merely the exercise or use of powers conferred or otherwise assented to by a sovereign authority. For obvious reasons, the people cannot, in the mass, execute laws, operate public services, or administer justice. They can, and in some states occasionally do, legislate, through the medium of the popular initiative and referendum. Even in this domain, however, they nowhere try to perform the whole task in such direct fashion. What happens, therefore, is that they intrust the exercise of varying portions of their sovereign authority—executive, legislative, and judicial—to agents which we know as the national and state governments. And, aside from making provision for the structure of the national government, the constitution of the United States is devoted mainly to drawing boundary lines between the powers which the national and state governments, respectively, are required or permitted to wield.

The people ultimately sovereign

The Distribution of Powers

✓ Three or four major facts about this distribution of powers call for emphasis. The first is that the national government has only delegated, "enumerated," powers. Such was the almost inevitable presumption from the language of the constitution as originally adopted. Some doubt, however, having arisen on the point, the Tenth Amendment, ratified in 1791, fixed the principle beyond all possible challenge. Express grants of power are made in the constitutional text to Congress, to the president, to the courts; but, says the Amendment, "all powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively or to the people."³ No reader of these lines will need to be told that the powers wielded by the national government today are immeasurably greater than in the times of Washington and Jefferson. At some points, they appear to a good many people to have been carried considerably beyond the bounds fixed in the constitution. In the eye of

National powers

¹ "Sovereignty" is a tricky word. As some one has remarked, the history of it in the United States illustrates the familiar fact that in all argument, if you insist on making certain words mean what you want them to mean, you can always reach the conclusion you wish to reach. With easy fluency, the states are today sometimes spoken of sentimentally as "sovereign."

² Cf. Marshall's vigorous assertions in *McCulloch v. Maryland*, 4 Wheaton 316 (1819).

³ In the federal system of Canada, the principle of distribution is precisely the opposite. Influenced to some extent, it would appear, by the recent spectacle of civil war in the United States, the authors of the British North America Act of 1867 assigned the provinces only enumerated powers and left everything else to the Dominion government.

the law, however, whatever expansion has taken place—except in taxation and one or two other areas where changes have been expressly authorized by constitutional amendment—has resulted solely from progressively wider and more penetrating applications of powers already possessed. President, Congress, and courts have no proper authority except such as can be found somewhere (as express provision or by implication) within the four corners of the constitution.¹

State
powers

A second fact, already suggested, is that the state governments, on the other hand, have powers that are original, inherent, and largely undefined. A certain number of powers belonging to state governments are, to be sure, mentioned in the national constitution. But there is no attempt to present a complete list. Carrying over into the new system the great bulk of powers which they possessed under the old one (and they would never have ratified the constitution unless permitted to do this), the original states have ever afterwards enjoyed the ample and undefined range of powers guaranteed in the Tenth Amendment—a range of powers which, although curtailed at some points by nationalizing amendments, and in effect also by legislation and judicial decisions, has expanded considerably more than it has contracted, notwithstanding the common impression that it is the powers of the national government alone that have been magnified in these later decades.² And of course, under the principle of state equality, all states subsequently admitted to the Union are entitled to, and possess, a similar range of authority.

No gov-
ernment
endowed
with un-
limited
powers

A third fact is that no government in our system has unlimited powers. The national government has only such powers as have been delegated to it, expressly or by implication; the state governments, although not confined to delegated powers, are heavily restricted by federal and state constitutional provisions; and measures enacted by either Congress or a state legislature (acts, too, performed by executive or administrative authorities), if regarded as exceeding the limits of powers constitutionally fixed, are practically certain sooner or later to be challenged in the courts, and may be held null and void.

From this it follows that by no means *all* power has been intrusted by the people to their governmental agencies. Plenty of powers are withheld

¹ The view of Theodore Roosevelt and others that powers affecting the nation as a whole belong to it, although not granted to it, was expressly rejected by the Supreme Court in *Kansas v. Colorado*, 206 U. S. 46 (1902). With respect to the field of international relations, however, the Court has more recently recognized (in *United States v. Curtiss-Wright Export Corporation*, 299 U. S. 304, 1936) that even if the constitution were silent on the point (which it is not), the power to carry on diplomatic intercourse and to make war and peace would belong to the federal government as being "necessary concomitants of nationality." In other words, such powers could properly be implied from the nationality predicated in the constitution.

² To confirm this fact of the enormous growth of state powers, one has only to compare the list of things that his own state is now doing—in the fields of taxation and finance, education, public health and safety, social insurance, conservation of resources, regulation of transportation and trade, control of elections, and what not—with the activities of any one of the states a hundred, or even fifty, years ago. Cf. Chap. xiv below (in complete edition of this book).

from the national government, simply by not being conferred in the national constitution; many are withheld from state governments by being prohibited in state constitutions. But—and this is the present point—some also are withheld from both national and state governments, either by being forbidden to both in the national constitution (*e.g.*, depriving a person of life, liberty, or property without due process of law) or by being prohibited to national and state governments concurrently by the respective constitutions (as in the case of taking private property for public use without compensation). Taken together, the federal and state constitutions thus leave, and in fact create, “spheres of anarchy”—of no government, so to speak, within which people may not be interfered with by public authorities.¹ As suggested by the above illustrations, these areas of immunity are associated mainly with civil rights and liberties; and the Ninth Amendment gives them a significant flexibility by stipulating that the enumeration of certain rights in the federal constitution “shall not be construed to deny or disparage others retained by the people.”

Viewed in the large, the distribution of powers under the constitution works out somewhat as follows:

Powers	A. Conferred or recognized	1. Conferred on the national government only (<i>e.g.</i> , conducting foreign relations, regulating foreign and interstate commerce)
		2. Recognized as belonging to the state governments only (<i>e.g.</i> , creating counties, chartering cities)
		3. Possessed by national and state governments concurrently (<i>e.g.</i> , taxation, borrowing money)
	B. Partially or totally forbidden	1. Forbidden to the national government only (<i>e.g.</i> , abridging freedom of speech or press, levying direct taxes otherwise than in proportion to population)
		2. Forbidden to the state governments only (<i>e.g.</i> , making treaties, coining money)
		3. Forbidden to both national and state governments (<i>e.g.</i> , passing <i>ex post facto</i> laws, abridging the right of United States citizens to vote on account of color or sex)

¹ C. A. Beard, *American Government and Politics* (5th ed.), 102.

Implied Powers

How the
question
arose

The careful phrasing of the constitution did not prevent—no linguistic niceties could have prevented—differences of opinion as to the limits of power of both the national and state governments, and lively controversies arose before the new system had been in operation a year. In 1790, Alexander Hamilton, secretary of the treasury, proposed the establishment of a national bank. Opponents of further centralization at once objected that the constitution, in enumerating the powers of Congress, said nothing about a bank; they could show, indeed, that its authors had refused to give Congress even a restricted and limited power to create corporations. Hamilton and those who supported his policy replied that while the constitution did not, to be sure, authorize Congress in so many words to create a bank, the power to do so could easily be deduced from certain grants of authority about which there could be no question.¹ This view prevailed, and the bank was established. Opinion on the matter, however—springing partly from sheer theory, but more largely from practical interest and political strategy—continued divided; and from this beginning the issue of “implied powers” broadened out until it became the weightiest (except only, during a decade or two, that of secession) in the entire history of the country.

Led by Jefferson, the strict constructionists argued that the national government had no powers except such as were expressly conferred upon it in the constitution, or, at the most, such as could be shown to be indispensably involved in the exercise of these enumerated powers. To take a single step, urged the Virginian, in a letter in which he gave Washington his views on the constitutionality of the proposed bank, beyond the boundaries “specially drawn” around the powers of Congress by the Tenth Amendment, “is to take possession of a boundless field of power, no longer susceptible of any definition.” On the other hand, the loose, or broad, constructionists, such as Hamilton, contended that the national government had all powers which could by any reasonable interpretation be regarded as implied in the letter of the granted powers, and also that it had a right to choose the manner and means of performing its work, even though involving the employment of agencies not necessarily *indispensable* for its purposes.

Implied
powers a
practical
necessity

On purely legal grounds, Jefferson’s argument was plausible; and events proved him right in predicting that the doctrine of implied powers, once accepted, would lead to endless expansion of the national

¹ In particular, those relating to currency and other aspects of national finance—backed by the “sweeping clause” with which the constitution’s enumeration of the powers of Congress concludes, and in which the two houses are authorized “to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof.” Art. I, § 8, cl. 18. The clause quoted became the principal basis for the entire development of implied powers in later times.

government's activities—often at the expense of powers originally considered as belonging to the states. The logic of practical necessity lay, however, with the Hamiltonian view. If the national government, perennially confronted with new conditions and unforeseeable problems, was to attain the ends for which it was established, it must without fail have the benefit of all authority that could reasonably be deduced from the grants that had been made to it; otherwise, it would be halted at points where inaction would be ruinous. This was eventually conceded, although grudgingly, by the Jeffersonians themselves; and when they gained control of the government in 1801, they soon were found availing themselves of implied powers almost as freely as had their Federalist rivals. On no other basis, for example, could Louisiana have been annexed in 1803 or an embargo laid on foreign trade in 1807.

In the course of time, the question, as a matter of constitutional construction, reached the Supreme Court; and in a memorable series of nationalizing decisions between 1809 and 1835 that tribunal—while acknowledging limits beyond which powers could not properly be implied—lent the full weight of its authority to the doctrine. Classic expression was given the Court's views by Chief Justice Marshall in the case of *McCulloch v. Maryland*, in 1819, as follows: "This government is acknowledged by all to be one of enumerated powers. The principle that it can exercise only the powers granted to it is now universally admitted. But the question respecting the extent of the powers actually granted is perpetually arising and will probably continue to arise as long as our system shall exist. . . . The powers of the government are limited, and its powers are not to be transcended. But we think the sound construction of the constitution must allow to the national legislature that discretion with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it in a manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited but consist with the letter and spirit of the constitution, are constitutional."¹

The doctrine here laid down gained general acceptance and is today firmly embedded in our constitutional law. Not only so, but, as a result of social and economic changes, of wartime and depression crises, and of growing belief in the usefulness of government regulation, the doctrine is nowadays applied in directions and in situations of which Marshall and his black-robed colleagues never dreamed. Remarkable indeed are the multifold activities for which it has supplied the sole legal justification. To cite a familiar illustration: From the constitution's terse grant of power to "regulate commerce with foreign nations and among the several states," Congress has drawn authority to control not only the trans-

Chief
Justice
Mar-
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Implied
powers
employed
freely

¹ 4 Wheaton 316. For an explanation of the case, see p. 80, note 2, below.

portation of goods by rail, water, motor, and air, but the carriage of passengers, the transmission of electric current, the moving of oil through pipe-lines, and the communication of ideas by telegraph, telephone, and radio; and not only to control, but even to prohibit, as in the case of the interstate transportation of commodities manufactured with the aid of child labor. Again: Starting with what appears a modest grant of authority to "establish post-offices and postroads," Congress is found providing for transportation of mail by railroad, steamship, and airplane; prohibiting interference with the mails; placing armed guards in railway mail cars; subsidizing and providing federal supervision of a national highway system; authorizing road-building by the national government itself; excluding seditious, salacious, and fraudulent matter from the mails; and maintaining a federal express business in the form of what we know as the parcel post. Once more: The constitution has nothing to say about unemployment compensation and old-age pensions. The delegates who rode into Philadelphia by stage-coach and on horseback could not possibly have foreseen the development of our present complicated industrial society. They did, however, write a "general welfare" clause into the constitution in connection with the power to tax and to borrow and spend. And when Congress in 1935 passed a Social Security Act extending the benefits of unemployment and old-age insurance to twenty-six million people, the Supreme Court found in that clause full authority for its doing so.

Checks
some-
times
imposed

Sometimes, to be sure, the executive and legislative branches embark upon policies involving the exercise of powers which the courts hold *not* to be warranted by the constitutional phraseology from which they were deduced. In this way, for example, an act of 1894 laying a federal tax on incomes—also the national child labor act of 1916—was rendered of no effect.¹ A similar fate befell the National Recovery Act and the Agricultural Adjustment Act of 1933. Speaking generally, the judges have been inclined to give the national government the benefit of a broad and liberal construction of the constitution's provisions. Some years ago, there was much complaint, centering in Administration circles, that the "nine old men" on the Supreme Bench at Washington were, by taking too restricted a view of implied powers, perversely obstructing the social and economic program associated with the New Deal of the Roosevelt era; and an enlargement of the Court's membership with a view to "liberalizing" the tribunal's attitude became the uppermost political question of 1937.² In a message to Congress, President Roosevelt contended that the founders of our government expected and intended that a liberal construction of the constitution in later years would give Congress the same relative powers over new national problems that they themselves had

¹ As we have seen, however, the Supreme Court reversed itself on the child labor issue in 1941. See p. 48 above.

² See pp. 472-477 below.

envisaged in respect to the national questions of their day. Others, however, were of the opinion that acceptance of so broad and general a principle would tend to break down the fundamental safeguard of limited powers, and believed that, rather than stretch implied powers to such lengths, the constitution should itself be amended to cover the matters most gravely at issue. The number of justices was not changed. But the appointment of "liberals" to several Supreme Court seats soon falling vacant achieved the Administration's essential purpose; and broad construction of implied national powers went on transforming the country's constitutional pattern.

Ultimate Supremacy of the National Government

Under our federal system, the national government is supreme within the sphere assigned to it, the states no less so in the sphere reserved to them. Contrary to opinions sometimes held in earlier days, this does not mean, however, that nation and states stand on a footing of equality. "This constitution," reads one of the instrument's most remarkable clauses, "and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States shall be the *supreme law of the land*; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."¹ "This clause," observes a distinguished historian, "may be called the central clause of the constitution, because without it the whole system would be unwieldy, if not impracticable. Draw out this particular bolt, and the machinery falls to pieces. In these words the constitution is plainly made not merely a declaration, a manifesto, dependent for its life and usefulness on the passing will of statesmen or of people, but a fundamental law, enforceable like any other law in courts."² What the clause means, in practice, is that, while the state governments may be, and are, supreme within their reserved spheres, these spheres are circumscribed not only by the delegation of many weighty powers to the national government, but by rigorous application of the rule that whatever the national government ordains—within the broad and still expanding area of its authority—is *supreme law*, enforceable as such and binding no less upon state executives, legislatures, courts, and people than upon officers and people of the nation itself. Nothing of the kind can be said for the laws of any state. So long, to be sure, as these laws go unchallenged by federal authority, or indeed if, upon being challenged, they are held to be not inconsistent with that authority, they may be said—so far as the national government is concerned—to be "supreme," within the boundaries of the state. If shown, however, to be incompatible with any legitimate exercise of power by the national government, they

How
guar-
anteed

¹ Art. VI, § 2.

² A. C. McLaughlin, *The Confederation and the Constitution*, 247.

lose all claim to validity; ¹ and many have in this way been rendered of no force and effect.

Who is to
decide in
cases of
dispute?

But who is to say whether a state government—or, for that matter, the national government—has overstepped the bounds marked out for it? The constitution gives no explicit answer, and there has always been difference of opinion as to what the framers intended. To be sure, there was a proposal in the Philadelphia convention that, as a means of upholding the “supreme law” and protecting the Union, Congress be given power to disallow any and all laws passed by state legislatures. But although at one time agreed to without dissent, so much opposition developed that the idea was given up. Again, the Virginia plan proposed to associate with the national executive a council of revision which should scrutinize every measure passed by Congress, with the further provision that any to which it objected should be allowed to take effect only if subsequently reenacted by a two-thirds vote in both houses. The convention’s final decision was, however, to put the federal veto power in the hands of the president alone; and the question of whether the courts, as an incident of their general judicial power, should have the right to declare either a federal or a state enactment unconstitutional was left without definite answer. In consequence, there have always been people who maintained that the fathers did not intend that the courts should have such power, and that the exercise of it by them is not only unsupported by the letter, but contrary to the spirit, of the constitution, and therefore sheer usurpation.

A task
for the
courts

An opposite view has, however, won more general acceptance. From the records, it appears that the constitution’s makers did not remain silent on the subject simply because they had not thought of it, nor yet because they considered it unimportant, but only because they regarded the function of review as necessarily involved in, and going along with, the work both of the state courts already existing and of national courts later to be established. Within the brief period of their existence, state courts already had declared legislation void as being incompatible with state constitutions; ² and in the Philadelphia convention it was simply taken for granted that the forthcoming national courts would, on their part, refuse to enforce as law any act of a state legislature “contravening,” as Roger Sherman put it, “the authority of the Union,” or, for that matter, any act of Congress transcending powers properly possessed. In so doing, the courts would be serving usefully the principles of federalism and check-and-balance implicit in the constitution. Judicial review, indeed, appears to become, under our system, one of the great “resulting” powers—a power arising from the very nature of the judicial function when operating under a system of government based upon limitation of

¹ The same holds true for provisions of state constitutions, and for state executive and administrative actions as well.

² *E.g.*, in the New Jersey case of *Holmes v. Walton* in 1780 and the Rhode Island case of *Trevett v. Weeden* in 1786.

powers and distribution of them between two sets of authorities inevitably tending to encroach upon one another.¹

As is so often the case, however, fact is here more important than theory; and the fact is that not only did the Judiciary Act passed by the very first Congress in 1789 authorize the federal Supreme Court to review any case in which a state court had upheld a state law alleged to be in conflict with the constitution, with a statute, or with a treaty of the United States, but the power was early brought into play, steadily broadened in scope and application, and has been employed with tremendous effect for more than a century and a quarter. An act of Congress was held void by the Supreme Court on the ground of unconstitutionality in the case of *Marbury v. Madison*, decided in 1803;² state statutes were declared void, on constitutional grounds, in a long line of cases beginning with *Fletcher v. Peck* in 1810.³ And thus was built up in the federal domain—paralleling a similar development in the states—a function which sharply differentiates our American courts from the courts of England and most other countries. Judicial review has, indeed, been termed America's distinctive contribution to the science of politics.⁴

From judicial review as developed by the federal Supreme Court arises a situation of major importance with respect to the boundary lines between federal and state powers. In all disputes touching the subject, the last word is, or may be, spoken by nine (indeed by a majority of *five*) federal judges in Washington—which is tantamount to saying that in conflicts of authority between national and state governments, the *national* government makes and enforces the decision, subject only to reversal by a constitutional amendment.⁵ As remarked by a well-known writer, the Supreme Court has throughout our history been "as impartial an umpire in national-state disputes as one of the members of two contending teams could be expected to be."⁶ As an organ of the national government, it has, however, undeniably shown predisposition, if not downright favoritism, toward that government. "The states," continues the writer quoted, "have had to play against the umpire as well as against the national government itself. The combination has been too much for them." Over against the clear principle that the national government is

The national government as judge of its own powers

¹ In No. LXXVIII of *The Federalist*, Hamilton expressly indicates that the courts were intended to exercise the function of review, and in his *The Supreme Court and the Constitution* (New York, 1912), C. A. Beard analyzes the opinions of the delegates to the federal convention and reaches the same conclusion.

² 1 Cranch 137. To be more exact, that part of the Judiciary Act of 1789 which authorized the Supreme Court to issue a writ of mandamus under certain circumstances.

³ 6 Cranch 37.

⁴ The nature and effects of judicial review are discussed more fully in a later chapter dealing with the federal judiciary. See pp. 465-469 below.

⁵ It should be observed, too, that the states as such may not challenge the acts of the national government, but must rely upon suits brought by individual citizens or corporations considering themselves injured by such acts.

⁶ O. P. Field, "States versus Nation, and the Supreme Court," *Amer. Polit. Sci. Rev.*, XXVIII, 233 (Apr., 1934).

a government of limited powers stands the hard fact that not a limitation is fixed in the fundamental law which Congress, the president, and the Supreme Court—indeed, merely Congress and the Court—acting concurrently, may not legally override. There are, of course, powerful restraining factors to be reckoned with: it is politically expedient—to put it mildly—to be able to convince the general mass of the people that the bounds set up in the constitution have not been transgressed; and the concurrence of the Supreme Court may be, and often is, impossible to obtain. Marvelous discoveries of previously unsuspected national power have, however, been made; others are no doubt impending; and, irrespective of the future fortunes of the New Deal, the frontiers of national authority will unquestionably prove to have been widened permanently since 1933 as in few, if any, other periods in the nation's history. All experience, too, goes to show that national power, once asserted and safely past the hurdle of the courts, is almost never relinquished. No important instance of surrender of a power so fortified can be cited except abandonment of the prohibition of the liquor traffic; and that retrenchment came about only because the national government itself, driven by public opinion, experienced a change of heart on the subject.¹

How
national
authority
is en-
forced

How is the supremacy of national authority maintained and enforced? Normally, of course, by the ordinary processes of legislation and administration, operating directly upon the people irrespective of states and state governments. When, however, these processes are challenged or obstructed, the courts may be brought into play to determine in how far the actions taken or proposed are constitutionally legitimate; and, once it is established (whether through judicial decision or otherwise) that the laws under which the national authorities are claiming to act are valid, the president may, indeed must, proceed to execute them, by military force if necessary. Both the Virginia and New Jersey plans as presented in the Philadelphia convention provided for forcible coercion of any state opposing or preventing the execution of national laws or treaties. When, however, it was settled that the new national government was to operate directly upon the people, and not merely upon states, this idea of coercing states as such was given up; and, as noted above, the Civil War itself

¹ No man ever asserted more unequivocally that the national government is not final judge of its own powers than did Thomas Jefferson, *e.g.*, in the Kentucky Resolutions of 1798. On the other hand, no major political group has ever sponsored policies and measures predicated on a more daring concept of national supremacy than did the reputedly Jeffersonian Democratic party under the leadership of Franklin D. Roosevelt in the earlier days of the New Deal—even though numerous "Jeffersonian Democrats" were forced into open revolt. The paradox is not mentioned in a spirit of criticism, but merely to emphasize the distance that we have traveled in a century and a half. Other times, other ideas!

National powers developed to meet special situations, *e.g.*, in wartime, may, of course, lapse into disuse. Once fully established, however, they can always be invoked again—except in the rare instance of a Supreme Court reversal of an earlier supporting decision. A good illustration of this sort of carry-over is afforded by various powers acquired during World War I and promptly put into effect again after Pearl Harbor. See p. 671 below.

was prosecuted by the Lincoln Administration on the theory that it was insubordinate men and women who were being proceeded against, not political entities in the form of states. In dealing with concrete situations requiring forcible execution of national law, it is not always easy, or even possible, to ignore the existence and actions of state governments. Certainly the theory underlying the Civil War became considerably blurred in the Reconstruction measures adopted after Lincoln's death. The principle that national power acts compulsorily upon people, not upon governments, is, however, clear; and effort is commonly made to adhere to it in practice.

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CHAPTER VI

THE CONSTITUTIONAL POSITION OF THE STATES

Importance of the states as governmental areas

The power and prestige of the national government must not be allowed to blind us to the lofty importance of the states. After all, our nation is the *United States* of America; and while the growth of national controls attracts wider attention, the states, too, have in these days more tasks to perform and more services to render than at any time in the past.¹ Impreguably entrenched as distinct, self-governing units or jurisdictions, with broad and undefined (although, of course, not unlimited) powers, the states still stand quite as close to the people as does the national government, touching their lives and interests at even more points. Amid the tremendously and necessarily centralized control of the federal government over men and materials incident to World War II, they retained genuine vitality, coöperated loyally in the war effort, and looked forward to greater power and importance after the restoration of peace. Notwithstanding, furthermore, that in the flush years of the New Deal the national government pioneered more dramatically, the states have in other periods undertaken a remarkable variety of legislative and administrative experiments "under the urge of a local opinion that does not have to wait to convert the entire nation to its hopes and beliefs," and have often marked out lines of advance along which the national government trod belatedly.²

The national government indeed presupposes the states, both structurally and functionally, as vital and political entities, and is so dovetailed with them—in matters like elections and constitutional amendment—that if they were suddenly blotted out, some of its most necessary processes would come to a halt. County, city, and town governments, on their part, would collapse completely, because it is only by state authority that they exist. Nation, state, local areas—all are interlocked, not only geographically, economically, and socially, but also politically, under a system of government which, however diverse its parts, must still be regarded as basically a unit. As we shall see in the next chapter, a major trend during the past decade and a half has indeed been in the direction

¹ This imperfectly realized situation is illustrated concretely in V. J. Brown, "The Growth of State Government," *State Government*, XVII, 276-277, 283 (Feb., 1944), with Michigan as an example—a state in which the number of state officials and the aggregate of state expenditures have doubled in fifteen years.

² As, for example, in the regulation of railroads and other utilities, in labor legislation, and in social insurance. Circumstances have combined to make Washington the great center of pioneering and experimentation in the past twelve or fifteen years. But the states are likely to regain a good deal of initiative in the postwar period.

of fuller integration of our governmental system—the national government extending its controls ever more deeply into the domains of the states and localities, the states and local areas reaching upward for closer tie-ups with the national government, and at the same time drawing nearer together under new forms of coöperative action. National government, state government, and local government, however, remain sufficiently distinct, on their respective levels, to justify us later on, when studying matters of structure and procedure, in taking up each of the three in a separate group of chapters.

The ways in which the states, viewed internally, are organized and governed will therefore be dealt with in due time.¹ For the present, we are concerned, rather, with a closer look at the place which the forty-eight jurisdictions occupy in the country's governmental system considered as a whole. In the present chapter, attention will be focussed upon formal constitutional provisions regulating their relations with the nation and with one another; in the chapter that follows, we shall be interested in seeing how these relationships have developed as a matter of experience and practice. In this latter connection, many things will come to light that the constitution's makers certainly did not anticipate.

Aspects
to be
con-
sidered
here

Admission of New States

First of all, there is the question of how a state becomes a state. To be sure, the matter seems a trifle academic, because more than thirty years have elapsed since any new state was added to the list. Alaska, however, is likely some day to be given statehood; and similar recognition for Puerto Rico and Hawaii, already many times suggested, will continue to challenge attention.² In addition, there is at least a remote possibility of the eventual creation of a few new states by dividing existing ones.

What has happened in the past is, of course, known to every student of our national history. The thirteen "original" states became members of the Union by participating together in the Revolution and ratifying the Articles of Confederation and the present constitution. The other thirty-five were brought in, one by one, by acts of Congress. Considered from the point of view of antecedent status or condition, these later commonwealths fall into four groups: (1) five which were formed by separation from other states, *i.e.*, Vermont set off from New York in 1791, Kentucky from Virginia in 1792, Tennessee from North Carolina in 1796, Maine from Massachusetts in 1820, and West Virginia from Virginia in 1862-63; (2) one, *i.e.*, Texas, which before its admission in 1845 was an independent republic; (3) one, *i.e.*, California, which was formed—also without passing through the territorial stage—out of a region ceded by

"Original"
and "ad-
mitted"
states

¹ In Part III of the complete edition of this book.

² In their national platforms of 1944, both major parties declared for the further development of all three territories with a view to eventual statehood.

Mexico in 1848; and (4) twenty-eight which previously were organized territories.

Process
of ad-
mission

The constitution confers on Congress general power to admit new states, subject only to two restrictions: (1) that no state may be erected within the jurisdiction of any other state except with the consent of the latter's legislature, and (2) that no state may be formed by the union of two or more states or parts of states without consent of the legislatures of all states concerned as well as of Congress.¹ Ordinarily, the procedure of admission is started by the people of a territory, who, if a substantial proportion desire statehood, send a petition to Congress asking that the territory be received into the Union as a state. If the petition is regarded with favor, Congress passes an "enabling act" authorizing the territorial officials to arrange for a popularly elected convention to frame a state constitution. The resulting instrument, having been submitted to the people, is, if approved, laid before Congress; and if it is there found acceptable, a joint resolution is passed declaring the said territory a state. Occasionally a territory has omitted the initial petition and gone at once to Congress with its proposed constitution.

Special
condi-
tions
may be
imposed

If, as has happened several times, Congress finds something in the constitution as submitted that it dislikes, or fails to find something that it thinks should be there, it will communicate its criticism to the authorities of the territory, either in the form of a suggestion or in that of a definite requirement to be met as a condition of admission. In the latter situation, there is nothing for the territory to do but comply—or wait for a possible change of opinion in the two houses; for without the consent of Congress no territory can become a state, and there is no way of compelling that consent to be given. In this manner, several incoming states have been subjected to requirements not imposed upon others.²

¹ Art. IV, § 3, cl. 1.

² Naturally, incoming states do not relish such treatment; and a vast amount of political and constitutional controversy has resulted. Nor, indeed, have conditions so imposed always been lived up to, once the state was safely in the fold. When, for example, in 1910 the people of Arizona, yielding to the objections of President Taft and many members of Congress, voted to eliminate the recall of judges from their proposed constitution, it was locally understood that the surrender was to be only temporary. And so it turned out. In his very first message, the governor of the new state recommended a constitutional amendment restoring the recall; and forthwith such an amendment was adopted by the legislature and approved by the voters. President Taft and Congress to the contrary notwithstanding, Arizona has had recall of judges ever since. Nor was it worth while for the national government to attempt to do anything about the matter, not only because an act admitting a state is a step that cannot be retraced, but also because, in decisions reaching back almost a hundred years, the Supreme Court had held that, while Congress is free to impose any conditions initially that it chooses, once a state is admitted, there is no way of compelling fulfillment of them if they are of such a nature as to compromise the independence of the state in managing its own internal affairs. On the other hand, a requirement that the state of Minnesota impose no tax on lands belonging to the United States, and no higher tax on non-resident proprietors than on residents, was upheld in 1900 (*Stearns v. Minnesota*, 179 U. S. 223)—on the ground that it was a contractual agreement respecting a matter of property and not affecting the state's political freedom. Whether, therefore, an imposed condition is enforceable after admission depends entirely upon the nature of the condition.

The president, too, can take exception to a proposed constitution, and can veto a resolution providing for admission.

Such minor differences as arise in this way do not, of course, prevent the states from being true equals in the eye of the law. In size, population, wealth, and general importance they, of course, vary enormously. The largest, Texas, has an area of 265,780 square miles; the smallest, Rhode Island, contains only 1,250. The most populous, New York, had 13,479,142 inhabitants in 1940; the least populous, Nevada, had 110,247. Average density of population varied, at the same date, all the way from 674.2 per square mile in Rhode Island to 1.0 per square mile in Nevada. Some states are almost wholly agricultural, others are mainly industrial and commercial. Some are of great weight in the councils of the nation, others count for comparatively little. Some are more able to provide the services expected of modern governments than are others. All have their separate and more or less differing constitutions, laws, courts, systems of taxation, and arrangements for local government. Nevertheless, in their constitutional and legal status they are equal.

Yet all
states
legally
equal

Obligations of the National Government Toward the States

The position of the states is further fixed by certain obligations which the constitution imposes, in their behalf, upon the national government. In the first place, that government is definitely required to respect a state's geographical unity and identity. As indicated above, it may neither instigate, promote, nor sanction the erection of any state within the jurisdiction of an existing state except with the consent of the latter's legislature.¹ Nor may it allow a state to be formed by uniting two or more states or parts of states unless the legislatures of the states affected indicate their approval. In other words, a state cannot be deprived of its separate existence, or even of territory, without its consent.²

1. Re-
spect for
geo-
graphical
unity
and
identity

A second obligation of the national government is to protect every state against invasion and domestic violence.³ An invasion of a state by a foreign enemy is, of course, also an invasion of the United States, and it is entirely logical that the national government should be authorized and required to repel the attack without waiting for any independent effort, or even a request for protection, to be made by the state as such. The repression of insurrections, riots, and other forms of domestic violence is a different matter. One of the principal things that the government of a state is expected to do is to maintain order; and unless such a government, finding itself unable to cope with a disturbance, calls upon the national authorities for assistance, those authorities will not inter-

2. Pro-
tection
against
invasion
and do-
mestic
violence

¹ Art. IV, § 3, cl. 1.

² The closest approach to a violation of this guarantee was the formation of the state of West Virginia from loyal western Virginia counties during the Civil War. Consent of the Virginia legislature took the form, merely, of a favorable vote by an assembly of supporters of the Union cause representing the seceding counties only. But of course it must be remembered that the rest of the state was in rebellion.

³ Art. IV, § 4.

vene, so long as national laws are not violated, national functions (*e.g.*, carrying the mails) interfered with, or national property endangered. If, however, assistance is requested, the president will comply, unless he is of the opinion that the state can and should handle the situation alone; and if national interests are menaced, he will act without invitation, and even against the wishes of the state authorities.¹

3. Guarantee of a republican form of government

A third requirement made of the United States is that it shall guarantee to every state a republican form of government.² The men who framed and adopted the constitution had no desire to see monarchy or oligarchy arise within the limits of the new nation; and, having lately witnessed the Shays rebellion and other subversive movements, they were determined to put it within the power—indeed, to make it the solemn duty—of the national government to prevent any form of political organization other than republican from establishing itself anywhere in the country. They did not define the term “republican,” and it is clear that they did not have it in mind to require any one precise governmental set-up, to the exclusion of all others. There were at the time considerable differences from state to state; yet all of the existing governments were regarded as republican. Madison assured the people that they had a right to “substitute other republican forms” whenever they chose and to claim the federal guarantee in behalf of them.

4. Who decides whether a state government is republican?

The final judge of whether the government of a state is republican is not the people of the state, but the national government. The constitution does not say, however, with which branch of the national government the decision shall lie. Conceivably, it might be the courts. In handling cases turning on the nature of republicanism, the Supreme Court, however, has always held that the question is of a political nature, and hence one to be decided by the political branches of the government, not by the judiciary.³ This leaves it to the president or Congress, or both. As for the president, he undoubtedly might pronounce the government of a given state non-republican and might use force to dispossess it. Indeed, in the single instance in which the guaranty clause was brought into play down to the time of the Civil War, *i.e.*, the Dorr rebellion in Rhode Island in 1841-42, President Tyler recognized the old government of the state as the rightful government and took steps to give it the aid which it asked against a rival government set up by an insurrectionary element led by Dorr. The really decisive factor in the national government's handling of the Rhode Island situation, was, however, the action of Congress in continuing to receive the state's senators and representatives. This, said the Supreme Court when a case growing out of the dispute came before it, constituted valid and final recognition of the state's government as being republican.⁴ It was Congress, too, that at the close

¹ See p. 355 below.

² Art. IV, § 4.

³ *E.g.*, in *Pacific States Tel. and Tel. Co. v. Oregon*, 223 U. S. 118 (1912).

⁴ *Luther v. Borden*, 7 Howard 1 (1844).

of the Civil War forced the Southern states, as a condition of regaining representation, to adopt suffrage (and other) arrangements which the radical Republican majority at Washington professed to consider essential to a republican form of government. Certainly its power to cut off a state from any share in controlling national policy, enacting national laws, and raising and appropriating national money gives Congress the whip-hand in the matter.

In the Reconstruction period, the term "republican" was construed arbitrarily and narrowly. At all other times, however, it has been interpreted broadly and liberally. Thus, when a generation or so ago, opponents of the popular initiative and referendum as newly adopted devices of direct legislation in Oregon sought to make out that republican government means only *representative* government, with all laws enacted by elected assemblies, the Supreme Court said simply that the question was one for the political arms of the government, and that as long as Congress continued to receive senators and representatives from the state, it (the Court) would be satisfied.¹ And Congress itself took the sensible view that as long as representative institutions are maintained by a state, it does not matter if they are *supplemented* by provision for direct action now and then by the people.

Tendency
to liberal
construction

Constitutional Limitations Upon the States

As we have seen, the federal constitution distributes powers between nation and states on the general principle that whatever is not conferred exclusively upon the national government remains to the states—with one obvious qualification, namely, that it does so only if not forbidden to them. Much, in point of fact is forbidden, in the interest of national unity and effective national government, giving rise to the "constitutional limitations" about which the lawyers talk; and while one large group of such limitations, having to do with the protection of civil liberties, calls for separate treatment in a later chapter,² certain additional ones of major importance require attention here.

To begin with, the constitution unequivocally forbids a state to enter into "any treaty, alliance, or confederation," and it prohibits any "agreement or compact" between states, or between a state and a foreign power, except, with the consent of Congress. Likewise, a state may not, unless Congress assents, keep troops or ships of war in time of peace, or engage in war unless actually invaded or in such imminent danger as will not admit of delay. Should Massachusetts desire to enter into an agreement with Great Britain, she could do so, with the permission of Congress, provided, of course, that the effect was not to create an "alliance or confederation," i.e., a relationship of a political character. With the consent of Congress, two or more states, furthermore—acting through their

1. Foreign and
inter-
state relations

¹ *Pacific States Tel. and Tel. Co. v. Oregon*, cited above.

² See Chap. ix below.

Inter-
state
compacts

governors or through specially appointed commissioners, and usually subject to legislative ratification—may make agreements or compacts among themselves; and although the full possibilities of promoting helpful coöperation among states by this method are only beginning to be realized, upwards of a hundred such agreements are on record—for example (a) one between New York and New Jersey in 1921 creating a Port of New York Authority charged with improving the facilities of New York harbor; (b) one of 1922 (finally effective in 1928) among the seven states containing portions of the basin of the Colorado river, and having to do with the allocation of rights to the waters of that stream, (c) a four-state pact (Washington, Oregon, Idaho, and Montana) of 1925 relating to the use of the waters of the Columbia and its tributaries, (d) a three-state compact (Oklahoma, New Mexico, and Texas) relating to the water supply of the Rio Grande and other rivers, signed in 1929 and assented to by Congress in 1930; and (e) a six-state compact (Illinois, Kansas, Oklahoma, Texas, Colorado, and New Mexico, with other states added later) in 1935 for the prevention of waste in oil production.

When
congres-
sional
consent is
necessary

The constitution seems to make all interstate agreements dependent upon the consent of Congress. In practice, however, there is no such rigid requirement. Without going to Congress about the matter at all, two or more states may agree to clean up a disease-producing district on their common border; and in point of fact, New York and New Jersey some years ago settled in this manner a long-standing dispute concerning sewage pollution of New York harbor. In 1931, Maryland, Virginia, and West Virginia similarly adjusted fishing rights on the Potomac, and in 1941, six Midwestern states signed an agreement upon higher standards in the dairy industry. As construed by the courts, the requirement of congressional consent applies only to agreements "tending to increase the political power of the states, which may encroach upon or interfere with the just supremacy of the United States."¹ Furthermore, where consent is necessary, it may be given either before or after the agreement is entered into, and may be either express or implied. Indeed, blanket permission to make agreements on a given subject may be given in advance; in 1936, for example, an act of Congress authorized any two or more of fourteen specified states in New England and in the Ohio Valley to enter into a compact for flood control and for preventing pollution of waters, and another in 1940 gave advance approval to a compact among Atlantic seaboard states for the better utilization of marine fisheries.²

Interest in interstate agreements, especially of regional scope, as aids

¹ *Virginia v. Tennessee*, 148 U. S. 503 (1893). The Supreme Court has habitually been well disposed toward the interstate compact as a mode of action. More than once, it has suggested to states engaged in litigation that it would be better for them to adjust their differences by compact or agreement; and the advice has not always gone unheeded.

² A full list of the interstate compacts of the period 1936-43—twenty-eight in number—will be found in *The Book of the States, 1943-1944* (Chicago, 1943), 52-57. New compacts entered into are reported in successive editions of this manual.

to the solution of difficult social and economic problems was considerably heightened by the country's experiences during the depression of the thirties and under the New Deal, and it is reasonable to expect that, notwithstanding the difficulties and delays often attending the negotiation of them (vexatious problems, too, of administration, enforcement, and amendment), many compacts in the future will relate to such varied matters as milk prices, minimum wages, hours of labor, control of the oil industry, conservation, and taxation. As a recent writer points out, opponents of centralization see in such devices "a kind of intermediate arrangement which avoids the centralizing tendencies of federal regulation, whereas the advocates of centralization consider compacts a basis for possible evolution of control from the state to the region and then from the region to the nation."¹

Speaking generally, the states are free to levy and collect taxes as they choose; and a wide variety of tax experience has resulted. There are, nevertheless, weighty constitutional limitations. To be sure, the restraints imposed by the national constitution in so many words are of only minor practical importance. Others, however, arising from clauses of general application, or from interpretation of the inherent character of the federal-state relation, are of far-reaching significance. The restrictions expressly imposed are that no state shall, without the consent of Congress, lay (1) "any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws," or (2) any duty on tonnage.² Import and export duties laid by state authority are subject to revision and control by Congress; and, further to discourage such taxation, all net proceeds are required to be turned over to the national treasury. State-imposed import and export duties—tonnage duties likewise—were not uncommon in the earlier decades under the constitution, but nowadays are almost unknown.

Among clauses of general application which have bearing on the taxing power are those forbidding a state (a) to deprive any person of . . . property without due process of law, or deny to any person within its jurisdiction the equal protection of the laws; and (b) to pass any law "impairing the obligation of contracts"; also the well-known clauses stipulating (a) that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states," and (b) that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." The taxing power may

2. Taxation:

(a) Export, import, and tonnage duties

(b) General constitutional provisions

¹ J. P. Clark, "Interstate Compacts and Social Legislation," *Polit. Sci. Quar.*, L, 502-524 (Dec., 1935). The article cited, of which there is a concluding instalment in the same periodical, LI, 36-61 (Mar., 1936), is the best extended discussion of one large and growing group of compacts. Cf. E. M. Johnson, *Interstate Compacts on Labor Legislation in the United States* (Geneva, 1936). An excellent brief piece of reading on the general topic is M. E. Dimock and G. C. S. Benson, *Can Interstate Compacts Succeed?* (Chicago, 1937).

² Art. I, § 10, cls. 2-3. A tonnage duty is a tax on ships levied on the basis of carrying capacity.

no more be employed in violation of these blanket provisions than may any other power.

(c) Ex-
emption
of federal
property

But there are also restrictions arising, not from specific constitutional provisions, but from interpretations placed upon the inherent nature of our federal system. One of these relates to federal property, which in general is immune from state taxation. To be sure, Congress in 1864 authorized the states to tax national bank stock and also the physical property belonging to national banks. Such property, however, is in reality private rather than public; and every effort of a state to tax real estate or other property belonging directly to the national government has met with defeat.¹ Certain Southern states in which the Tennessee Valley Authority has acquired large stretches of land were formerly so handicapped that in 1940 the Authority was required by act of Congress to start paying a percentage of its gross power proceeds to states and counties in lieu of the tax revenues lost.

(d) Ex-
emption
of certain
federal
"instru-
mental-
ities"

Until 1939, there would have been cited also a blanket interpretation preventing the states from taxing federal "instrumentalities" such as bonds and other securities (or the income therefrom), franchises granted by the federal government, and salaries of federal officials and employees. On its part, the federal government was supposed to be debarred from taxing state officials' salaries, as well as income from state and municipal bonds, and other state "instrumentalities." Under force of the reasoning employed by Chief Justice Marshall in *McCulloch v. Maryland* in 1819,²

¹ When, indeed, in 1937, the city of Springfield, Mass., undertook to assess land acquired and for a time used by the federal government for a post-office but subsequently leased to private parties for use as a bus depot, the federal Supreme Court, in *City of Springfield v. United States*, 306 U. S. 650 (1939) held that not only federal property in general, but such property when leased to private users, is tax exempt. In a case in 1944 involving an attempt in Pennsylvania to tax gun-making machinery belonging to the federal government but leased to a private manufacturer of munitions, it said the same thing. *United States of America and Mesta Machine Company v. County of Allegheny, Pennsylvania*, 322 U. S. 174. On the other hand, when the federal government sought to have voided tax liens on lands which it had acquired in Alabama, the Supreme Court held (in *United States v. Alabama*, 313 U. S. 274, 1941) that the liens remained good, even though Alabama could hope to enforce them only after the lands in question should have passed from the federal government to private owners.

² In 1818, the state of Maryland imposed a stamp tax on the circulating notes of all banks or branches thereof located in the state and not chartered by the legislature. The Baltimore branch of the United States Bank refused to pay the tax. Suit was brought against the cashier, McCulloch, and the state court rendered judgment against him; whereupon the case was taken to the federal Supreme Court. Pronouncing the law imposing the tax unconstitutional, Marshall declared (in a decision cited above as helping to establish the doctrine of implied powers) that, unlimited as is the power of a state to tax objects within its jurisdiction, that power does not "extend to those means which are employed by Congress to carry into execution powers conferred on that body by the people of the United States... powers... given... to a government whose laws... are declared to be supreme."

³ *Wheaton* 429 (1819). As indicated above, national bank stock and the physical property of national banks are taxable; but this is on the theory that, falling on property rather than on operations, the taxes do not impair the capacity of the banks to serve the national government according to the intent of the laws establishing them.

these reciprocal immunities were long regarded as flowing inevitably from the very nature of the federal system, and as being inviolable unless terminated or altered by federal constitutional amendments. Mounting budgets and need for new sources of revenue gradually led, however, within the past two or three decades, to a different view of the matter. After all, why should not people living from salaries drawn from government bear the same tax burdens as those obtaining their livelihood from private employment? How could such taxation be construed as a burden upon *governments* as such? And why should not the Sixteenth Amendment empowering Congress to lay and collect taxes on incomes, "from whatever source derived," be taken, at face value, to include the taxation of governmental salaries? Long before 1939, exemption of government officials and employees from taxation of their salary income seemed to many people unfair; and as for incomes from government securities, at least three Republican presidents (Harding, Coolidge, and Hoover) had agreed with Secretary of the Treasury Mellon in his characterization of their exemption as "an economic evil of the first magnitude."¹

The upshot was that when, in 1939, President Franklin D. Roosevelt, returning to a subject on which he had previously spoken with feeling, urged Congress to wipe out all existing tax immunities of federal, state, and local salaries and income from securities, he was successful to the extent of securing the desired legislation with respect to salaries, although not with respect to income from securities. Opposition came principally from those who argued that such action ought to be taken only in pursuance of a constitutional amendment. But when the constitutionality of the new legislation was challenged in the Supreme Court, that body—which, with its newly "liberalized" membership,² had of late been showing a disposition to turn its back on a good many of its earlier decisions, including *McCulloch v. Maryland*—sustained it in full.³ The federal government now, therefore, taxes state and local salaries, and the states

¹ Such exemption, according to Mr. Mellon, has three harmful consequences: (1) by making it easier for federal and other governments to sell bonds, it encourages the growth of public indebtedness; (2) it tends to divert capital from productive enterprise; and (3) it "enables a very large class of investments to escape their just share of taxation." In January, 1939, the under-secretary of the Treasury estimated that the sum of sixty-five billion dollars was then invested in tax-exempt securities issued by the state and local governments, and that removal of such exemptions would net the national government about \$300,000,000 a year. See A. L. Powell, *National Taxation of State Instrumentalities* (Urbana, Ill., 1936); M. Philipsborn, Jr., and H. Cantrill, "Immunity from Taxation of Governmental Instrumentalities," *Georgetown Law Jour.*, XXVI, 543-573 (Mar., 1938); A. G. Buehler, "Discriminations in Federal Taxation of State and Local Government Securities," *Amer. Polit. Sci. Rev.*, XXXVI, 302-312 (Apr., 1942).

² See pp. 475-476 below.

³ *Graves v. People of the State of New York ex rel. O'Keefe*, 306 U. S. 466 (1939). Cf. *State Tax Commission of Utah v. Van Cott*, 306 U. S. 511 (1939). The point to these decisions was, not that national and state governments may tax each other, but only that the taxing by either of salaries paid by the other imposes no burden upon any government, but merely one upon the persons who pay the tax.

are reciprocally free to tax federal salaries—which practically all of them that tax incomes at all were doing by the end of 1940.¹

Income derived from securities of the national government, even when issued not to raise money for the government's own use, but only to secure funds to be lent to farmers and home-owners, is still (1945) exempt from state (although in the case of more recent issues, no longer from federal) taxation. The Roosevelt Administration was resolutely committed to federal taxation not only of future issues of state and local securities, but also of those currently outstanding. To date, not even the extreme pressure for revenue incident to wartime spending has brought results. It seems safe, however, to predict adoption of the proposal sooner or later (incidentally opening the way also for state taxation of federal securities); and while it will be argued that a constitutional amendment is required, it is difficult to see—in the light of the O'Keefe and other decisions—how the Supreme Court could withhold its sanction from a simple act of Congress on the subject.²

The authority given Congress to "regulate commerce with foreign nations and among the several states, and with the Indian tribes,"³ is not designed to interfere with control by the states over commerce that is strictly intrastate. To be exempt from federal-regulation, however, commerce must originate, end, and have its entire course in a single state; commercial transactions which at any stage take on an interstate aspect are subject to federal regulation from the moment they begin until they are completed.⁴ To be sure, with a view to public safety, a state may impose regulations on a railroad (e.g., forbid the employment

¹ Even before the legislation of 1939, federal, state, and local officials and employees totalled 3,788,616 and their aggregate annual compensation amounted to \$5,506,874,000. During the ensuing war years, these figures were roughly doubled—which gives some idea of how much revenue would have been lost if tax immunities had still been in effect.

² It may be added that the Democratic national platform of 1940 declared against future issuance of tax-exempt federal, state, and local securities; that in the same year the national program committee of the Republican party took a similar position, although the party platform was silent on the subject; that *Fortune* and Gallup polls simultaneously indicated that three-fourths of the people favored the proposal; that in 1941 an act of Congress gave the secretary of the treasury discretionary authority to sell taxable federal securities; that this official forthwith announced that no future federal issues would be exempt; that in his budget message of January 6, 1942, President Roosevelt urged legislation (not a constitutional amendment) subjecting all future state and local-government securities to federal taxation; that a provision to this effect was deleted by the House ways and means committee from the ensuing revenue bill, and likewise from the revenue bill of 1943; and that in 1944 the national platforms of both major parties were silent on the subject. See K. M. Williamson, "The Case for Taxation of Governmental Securities," *Annals of Amer. Acad. of Polit. and Soc. Sci.*, CCXIV, 68-72 (Mar., 1941). For counter-arguments (emphasizing increased difficulties of local financing that would result), see C. H. Chatters, in *ibid.*, 73-77, and P. V. Betters, "The Case Against Taxing Income from Governmental Securities," *Law and Contemporary Problems*, VII, 222-234 (Spring, 1940). Cf. debate of the issue in E. H. Foly and H. Epstein, "Shall We Tax Government Bonds?," *Nat. Mun. Rev.*, XXX, 674-688 (Dec., 1941).

³ Art. I, § 8, cl. 3.

⁴ See Chap. xxvii below, where one will be impressed with the progressive narrowing of state control because of recent judicial construction of the term "commerce" to include manufacturing, mining, and other operations of production.

of color-blind engineers or limit speed of trains within city limits) which will incidentally affect the carrying on of interstate commerce across its territory. But the courts will uphold such regulations only in so far as grounded upon the state's basic police power, and not upon any right to regulate interstate commerce as such.

One of the main advantages of union is a common currency system. Hence the federal constitution gives the national government full control over the country's currency and forbids the states to coin money, to emit bills of credit, or to "make anything but gold and silver coin a tender in payment of debts."¹ Under their reserved powers, the states can charter banks; and banking institutions so created exist beside and compete with national banks in all of the states. Furthermore, the states can authorize these banks and banking associations to issue notes for circulation as currency, although not as legal tender. In 1866, however, this latter power was stripped of all practical significance by an act of Congress laying a ten per cent tax on such notes and thereby making it unprofitable to issue them. The Supreme Court upheld the measure,² and as a result, state bank currency has passed entirely out of existence.

4. Cur-
rency

Society exists and business is carried on by virtue of a network of human relations which find expression in agreements, or contracts; and little thought is required to show how insecure and otherwise difficult our everyday existence would be if these agreements could be disregarded with impunity. It is not strange, therefore, that the framers of the national constitution put into that instrument a clause explicitly forbidding the states to pass any law impairing the obligation of contracts.³ They did not lay a similar prohibition on the national government; but this was mainly because they expected the business relationships of people to be controlled by the state governments rather than by Congress.

5. Con-
tracts

A contract may be defined as an agreement enforceable at law; and no state legislation which weakens the obligations arising from such an agreement is valid unless considerations of public health, safety, or morals demand it and compensation is assured for the injury done. Both the definition and the rule are, however, easier to state than to apply. Ordinary agreements, executed in due legal form, between individuals or groups of individuals are obviously included. But how about a charter granted by a state to a bank or a railroad company? Or an appointment to a public office? Or a license to practice medicine? These and many similar questions have been passed upon in numerous judicial decisions, with results which must be stated briefly. In the Dartmouth College case, in 1819, the Supreme Court held that the charter of the college, granted by the English crown, was a contract which the state of New Hamp-

Status of
charters
and
fran-
chises

¹ Art. II, § 10, cl. 1.

² *Veazie Bank v. Fenno*, 8 Wallace 533 (1869).

³ Art. I, § 10, cl. 1.

shire, as represented by its legislature, had no power either to revoke or to impair without the college's consent.¹ This was tantamount to saying that franchises and charters obtained from state legislatures by private corporations were protected by the constitutional guarantee against ever being withdrawn or altered without consent of the holders; and corporations long tried to maintain that any withdrawal or curtailment of privileges once granted them was an illegal impairment of contract. If this contention could have been sustained, the results would have been serious. But later the courts took the common-sense view that charters and franchises are, after all, only a species of property, and as such can be modified, or even revoked, with compensation rendered—or even without compensation when it can be shown that a corporation's business is "affected with a public interest" and that such public interest demands state intervention. Furthermore, it is open to legislatures, when granting new charters, to insert in them clauses making them revocable, or at least limiting their duration to a brief period of years; and this is now usually done. Indeed, a state constitution may cover the matter blanketwise (as does that of Wisconsin) by making *all* acts of the legislature subject to alteration or repeal. Having taken precautions on some such lines, a state can amend or abrogate a charter or franchise at will, subject only to the provision of the Fourteenth Amendment that no person (individual or corporation) may be deprived of life, liberty, or property without due process of law—which means, among other things, that while a corporation may be extinguished, the tangible property interests of the stockholders cannot simply be wiped out.²

By judicial determination, the charters of public corporations, *e.g.*, cities and counties, investing them with subordinate legislative and other governmental powers are not contracts within the meaning of the "obligation" clause. So far as the national constitution is concerned, the state legislature can repeal them or amend them in any way at any time. Various forms of agreement between a state and its citizens are also construed not to be contracts. Thus a person who is appointed to a public office, even for a fixed term and at a stipulated salary, acquires no vested right in it; no contract is violated if the state later abolishes the office. Furthermore, a license issued by a state, or by one of its political subdivisions, is not a contract, but only a grant of privilege which legally can be revoked at any time.

¹ *Dartmouth College v. Woodward*, 4 Wheaton 518 (1819). The case arose out of an attempt of the state to take control of the college out of the hands of its trustees.

² That even the contract clause of the constitution can be bent from its ordinary meaning in time of emergency was revealed in 1934 when, by a five-to-four decision, the federal Supreme Court sustained a Minnesota law giving property-owners the right to apply in court for a two-year extension of the time in which to redeem their property about to be taken under foreclosure of mortgage. Without trying to deny that the statute did violence to the obligation of mortgage contracts, the Court held that the impairment was a justifiable exercise of the state's police power under the unusual conditions created by the economic depression. *Home Building and Loan Association v. Blaisdell et al.*, 290 U. S. 398 (1934).

Obligations of the States in Their Relations with One Another

Every state is legally separate from every other state, and each has jurisdiction only within its own boundaries.¹ Massachusetts cannot project her laws into Connecticut; an Illinois state judge cannot hold court in Indiana. Every state, however, must constantly have dealings with other states, and the populations of all of the forty-eight are perpetually commingling in pursuit of the various trades and professions. It therefore becomes a practical necessity that the states accept in common certain obligations toward one another. Four specific obligations were, indeed, imposed by the national constitution as originally adopted. One of them—the duty to deliver up fugitive slaves escaping from one state into another—became obsolete when the Thirteenth Amendment abolished slavery in 1865. The other three continue in effect, and pertain to (1) recognition of legal processes and acts, (2) interstate citizenship, and (3) rendition of persons accused of crime.

"Full faith and credit," says the constitution, "shall be given in each state to the public acts, records, and judicial proceedings of every other state."² This does not mean—so the Supreme Court has held—that one state is obliged to aid in enforcing the penal laws of another state.³ But it does mean that records of deeds, wills, contracts, mortgages, charters, legislative enactments, and other civil acts or instruments must, when duly authenticated according to forms prescribed by Congress, be recognized and accepted at their face value in every other state precisely as in the state from which they emanated. It means also that the authorities of Illinois (for example) must recognize and carry out the decisions of the courts of Michigan in civil cases, on presentation of certified copies of the relevant records, exactly as they would honor decisions of the courts of their own state. Thus a will made in New York but probated in Texas is just as good in the latter state as in the former, no matter how widely the laws of the two states on the subject of wills may differ. Or, to take another illustration: A and B are residents of Detroit. A brings suit against B and gets a judgment in the amount of \$500. Without paying, B moves to Chicago, taking his property before it can be attached. Under the "full faith and credit" clause, A can go into a court in Illinois, and with simply the judgment of the Michigan court as evidence, obtain a decree against B for the amount of the judgment. B may challenge the authenticity of the record; and he may demand a new trial on the ground that the Michigan court did not have jurisdiction. But on no other grounds can he secure a reopening of the case. An

1. Recognition of legal processes and acts

¹ Slight exceptions are afforded by occasional state laws permitting law-enforcement officers, in "hot pursuit" of an alleged offender, to follow him across the border, arrest him, and turn him over to the local police.

² Art. IV, § 1.

³ *Wisconsin v. Pelican Insurance Company*, 127 U. S. 265 (1888). As will be pointed out presently, a state may surrender an accused person to the state from which he has fled; but it will not try him or enforce a penalty imposed upon him elsewhere.

obligation cannot be evaded by the easy method of simply moving from one state to another.

On a lengthy list of subjects, the laws of the states, even in the same section of the country, differ widely. Some progress has been made in bringing about uniform legislation on such matters as commercial transactions;¹ but the obstacles are many, and as long as our federal system exists, the authorities of any one of the states will have to be prepared to coöperate in giving "full faith and credit" to actions taken under laws which differ sharply in content and spirit from their own. Two illustrations must suffice. The laws under which corporations may be chartered differ widely, with those of Delaware probably the most liberal with respect to the status of securities issued and the obligations owed to stockholders and the public; hence the great number of large businesses all over the country holding Delaware charters—through which, for a fee, they have virtually purchased varying degrees of exemption from the regulations of another state or states. Even more notorious is the matter of divorce. Under existing laws, the same couple might perfectly well be regarded in one state as, by its standards, lawfully married, in another as divorced, and in still another as in a status altogether uncertain. Until 1942, a Supreme Court decision of 1906² maintained a reasonably rigorous standard with respect to divorces which the states were bound in common to recognize. At that date, however, the Court so far relaxed its attitude as to hold that a divorce granted in Nevada—a state fixing two years as the period of "legal residence" for other purposes, but only six weeks for purposes of a divorce—must, under the "full faith and credit" clause, be recognized by all states;³ and to the objection that the ruling would enable a state with lax divorce requirements to enforce its standards on states with strict ones, the judges (or most of them) could make no more comforting reply than that such a result is "part of the price of our federal system."⁴ Out of regard for considerations of comity, states usually give the benefit of the doubt to acts of other states even when not compelled to do so by judicial intervention.

2. Inter-
state
citizen-
ship

The framers of the national constitution rightly thought that no state should be allowed to discriminate, in favor of its own citizens, against persons coming into its jurisdiction from other states. To do so would be inherently unjust, and would seriously interfere with genuine national unity. Hence it is provided that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."⁵ In general, this means that citizens technically of the various

¹ See pp. 784-786 in complete edition of this book.

² *Haddock v. Haddock*, 201 U. S. 562 (1906).

³ *Williams v. North Carolina*, 317 U. S. 287 (1942).

⁴ The decision stirred wide protest and gave added point to demands long heard that the federal constitution be so amended as to give Congress power to legislate on marriage and divorce.

⁵ Art. IV, § 2, cl. 1.

states as *such*, which, however, is practically the same as to say citizens of the United States, may move freely about the country and settle where they will, with the assurance that as newcomers they will not be subjected to discriminative taxation, that they will be permitted to carry on lawful occupations under the same conditions as older residents, and that they will not be prevented from acquiring and using property, or denied the equal protection of the laws, or refused access to the courts. It does not mean that privileges of a political nature, *e.g.*, those of voting and holding office, must be extended forthwith. Nor is a state prevented from imposing quarantine or other police regulations which will have the effect of denying free ingress or egress or the right to bring property in or to take it out. But such police restrictions must be justified by provable public necessity; furthermore, they must be so framed as to fall alike upon the citizens of the given state and those of all other states. It is hardly necessary to add that a citizen of New York, migrating to Pennsylvania, does not carry with him the rights which he enjoyed in New York. The point is rather that he becomes entitled to such rights as the citizens of Pennsylvania enjoy.¹

A third obligation resting upon a state is the rendition of fugitives accused of crime. "A person charged in any state with treason, felony, or other crime," says the constitution, "who shall flee from justice, and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime."² The object is, of course, to prevent criminals from "beating the law" by taking refuge on soil over which the states from which they have fled have no jurisdiction and on which they can execute no processes. Rendition as practiced among the

a. Rendition:

¹ R. Howell, "The Privileges and Immunities of State Citizenship," *Johns Hopkins Univ. Studies in Hist. and Polit. Sci.*, XXXVI (1918). By judicial construction, outside corporations seeking to do business in a state may have limitations imposed upon them which are not applied to domestic corporations, notwithstanding that in law corporations are "citizens," at least of a qualified sort. Indeed, corporations—except such as are engaged in interstate commerce or in aiding in the discharge of governmental functions—may be excluded from a state altogether.

During the depression decade, interstate migration—with more than two million persons crossing state lines every year in quest of work—created exceedingly difficult social and economic problems, especially for states (most of all, California) receiving the heaviest influx; and in twenty-seven states restrictive legislation of one sort or another was enacted. In November, 1941, a California statute making it a misdemeanor to "bring or assist in bringing into the state any indigent person who is not a resident of the state, knowing him to be an indigent person," was declared unanimously by the federal Supreme Court (in *Edwards v. California*, 314 U. S. 160) to exceed the police powers of the state and to violate the commerce clause of the federal constitution, and hence to be unconstitutional. The effect, of course, was to upset the "Okie" laws of all twenty-seven states having them. The general principle of freedom of migration is clear; but in practice it has not prevented some states from successfully maintaining restrictions—in the form, for example, of arbitrary regulations relating to vehicles with out-of-state licenses. See S. M. Cohen, "State Regulation of Migration of Indigent Persons," *Bill of Rights Rev.*, II, 119-126 (Winter, 1942); H. Roback, "Legal Barriers to Interstate Migration," *Cornell Law Quar.*, XXVIII, 281-312, 483-526 (Mar., June, 1943); J. H. McGrath, "State Settlement Laws Delay Victory," *State Government*, XVI, 31-33 (Feb., 1943).

² Art. IV, § 2, cl. 2.

states is similar to, and was suggested by, extradition as carried on from very early times in the domain of international relations. There are, however, important differences. Nations are sovereign authorities and, as such, they practice extradition only within rather rigid limits. In the first place, they will rarely or never hand over a fugitive unless they have a reciprocal extradition agreement with the nation demanding him. In the second place, they will not surrender him unless the crime of which he is accused is one of those enumerated for extradition purposes in the agreement. Furthermore, nations usually refuse to extradite their own citizens or subjects; and by almost universal usage, political offenders, *e.g.*, persons accused of participating in a rebellion, are exempted. Finally, it has become an accepted rule that an extradited person cannot be tried for any offense other than that named in the warrant of extradition. Rendition as practiced by the states, on the other hand, is provided for by the national constitution, *not* by interstate agreements; the offenses for which an accused person is to be delivered up are broadly defined as treason, felony, and "other crimes"; states commonly give up their own citizens on proper demand; and there is no rule against trying a person so delivered up for an offense other than that with which he was charged when his delivery was requested.

Proce-
dure

The constitution says that the demand for the surrender of a fugitive from justice shall be made by the executive authority of the state from which the person fled; and an act of Congress provides that it shall be addressed to the executive authority of the state in which the accused has been apprehended. If, therefore, A kills a man in Ohio and flees into West Virginia and is there placed under arrest, the governor of Ohio will send a requisition, accompanied by a certified copy of the indictment, to the governor of West Virginia asking the return of A so that he may be placed on trial in an Ohio court. If the requisition is honored, the fugitive will be turned over to the Ohio police officer who has been dispatched to bring him back.

Limita-
tions

There is no certainty, however, that the demand will be complied with. To be sure, the constitution says plainly that the fugitive "shall . . . be delivered up"; and the act of Congress says, with equal directness, that it "shall be the duty" of the executive authority to cause him to be handed over. But despite such lucid and mandatory language, many cases of refusal are on record. The governor upon whom the demand is made may decline to comply, on the ground that the person wanted is not a fugitive, or that the evidence against him is not sufficient to establish a presumption of guilt, or that he will not get a fair trial if returned, or that the alleged offense is not known to the law of the refuge state, or that there has been unreasonable delay in making the requisition; the actual reason may be something still different—perchance a mere whim, or even a personal grudge. But in any event there is no way by which a refusal can be overcome; no court will issue a writ of man-

damus to compel compliance.¹ In the final analysis, the obligation is effective only in so far as chief executives are willing to make it so. Yet this does not mean that it is a dead letter, or even that it is commonly ignored; on the contrary, it is observed in the great majority of cases, and when not observed, is usually evaded for reasons that have substantial merit.²

Disputes Between States

The history of the Confederation was filled with controversies between states regarding boundaries, commercial regulations, and other matters, and the makers of the constitution were not so optimistic as to suppose that under the new frame of government the members of the Union would always live in perfect accord. Among sovereign nations, disputes have traditionally been settled by (a) direct agreements reached through negotiation, (b) arbitration undertaken by some neutral ruler or similar authority, (c) adjudication in an international court, or (d) in the last resort, by war. The states of the Union are not supposed to make war on one another—although they did so in 1861-65. They may, and do, reach agreements through direct negotiation. But the method of settlement chiefly contemplated by the constitution's authors was that of judicial determination; and in pursuance of this intent, the judicial power of the United States is extended to all "controversies between two or more states," with the further stipulation that in all cases in which a state is a party (regardless of the character of the opposing party) the Supreme Court shall have original jurisdiction.³ The road to amicable adjustment of interstate differences by regular judicial process is thus always open, and many troublesome disputes relating to boundaries, water diversions, fishing rights, and other matters have been cleared up by resorting to it.⁴

Modes of
settle-
ment

¹ "The words 'it shall be the duty,'" declared Chief Justice Taney, "were not used as mandatory and compulsory, but as declaratory of the moral duty which this command created, when Congress had provided the mode of carrying it into execution. The act does not provide any means to compel the execution of this duty, nor inflict any punishment for neglect or refusal on the part of the executive of the state; nor is there any clause or provision in the constitution which arms the government of the United States with this power." *Kentucky v. Dennison*, 24 Howard 60 (1861).

² A long list of heated controversies between governors over rendition questions includes that between the chief executives of New York and Pennsylvania in respect to Harry K. Thaw a generation ago and a more recent one between the governors of Georgia and New Jersey over Robert E. Burns, author of *I Am a Fugitive from a Chain-Gang*.

³ Art. III, § 2, cl. 2.

⁴ A complete record of interstate suits to 1918 will be found in J. B. Scott [ed.], *Judicial Settlement of Controversies Between States of the American Union*, 2 vols. (New York, 1918). During the next five years after this work was published, no fewer than twenty-eight suits between states, or phases of such suits, were filed with or passed upon by the Supreme Court. See *Amer. Jour. of Internat. Law*, XVII, 326-328 (Apr., 1923); and cf. C. Warren, "The Supreme Court and Disputes Between States," *Internat. Conciliation*, No. 366 (Jan., 1941). The judicial character of controversies between states is discussed at length in *Kansas v. Colorado*, 185 U. S. 125 (1902).

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CHAPTER VII

CHANGING FEDERAL-STATE-LOCAL RELATIONS

The conditions under which the United States became a nation predestined it to federalism; and although there are those who disagree, the general opinion of the American people is that for us, if not indeed for any country of continental dimensions, a federal system is not only inevitable but desirable, as being perhaps the only alternative to autocracy. The federalism that we have today is, however, far from being that with which we started; and, having observed the basic outlines of it as presented in the constitution, we turn to take a look at what has come about in actual practice—at the changed, and still changing, position and interrelations of units of government on the three great levels, federal, state, and local. State-local relations can appropriately be reserved for consideration at a later point.¹ But the relations of nation and states, and some particularly novel connections between the nation and local units, call for attention here.

Woodrow Wilson once said that the relation between nation and states is the cardinal question of our constitutional system. Certainly, as we have seen, that issue, overshadowing all else in the Philadelphia convention, injected itself afresh almost as soon as the constitution went into operation; and there has never been a time in later days when our politics, legislation, judicial proceedings, and administrative actions did not, to a considerable extent, revolve around it. Moreover, never since the Civil War has it stirred greater interest or stronger feeling than in the recent era of the Rooseveltian New Deal.

A perennial problem

Seeking in 1788 to reassure people who were troubled about the outlook for the states in case the proposed constitution were adopted, Hamilton asserted that it would "always be far more easy for the state governments to encroach upon the national authorities than for the national government to encroach upon the state authorities";² and in a century and a half of varied experience there have been periods in which the states have more than held their own. Hamilton's prediction, however, has, on the whole, not been borne out. For while all of our governments, state and local as well as national, have continued to take on new functions and to develop new controls,³ the national government has gained in range and depth of power in a wholly disproportionate degree.

Growing preponderance of the national government

¹ In Parts III-IV of complete edition of this book.

² *The Federalist*, No. xvii (Lodge's ed., 98).

³ Except only at the lowest levels, where the township, for example, has declined in importance and in some places practically disappeared.

Under the impact of inventions, of new economic and social conditions, of changing political concepts, and of war and depression crises, it has ceaselessly penetrated new areas and undertaken novel activities—by no man's clairvoyant planning, but in progressive response to demands that could not be—at all events were not—met by state and local action. Some of the very interests, *e.g.*, farmers and industrial workers, which in earlier days opposed the formation of a stronger union are now numbered among the national government's firmest supporters. It is going too far to say, as some do, that the historic question of federal-state relations has been settled. The issue has, however, been shifted to new ground; and some of the aspects that it now bears—less in the realm of legalism and more in that of practical coöperation—merit comment.

Methods of Growth of National Power

1. Constitutional amendment

In what ways, chiefly, has the balance between national and state power been turned so decisively in favor of the former? One, of course, is the amending of the national constitution. To be sure, most of the twenty-one amendments thus far adopted have had to do with limitations upon, rather than extensions of, national powers. But the Fourteenth Amendment imposed many restrictions upon the states at points at which they had previously been free; the Fifteenth and Nineteenth took significant steps in the direction of nationalizing the requirements for the suffrage; the Sixteenth conferred the right to levy income taxes without apportionment; and the Eighteenth—although eventually repealed—for a time empowered the national government to prohibit the manufacture, sale, and transportation of intoxicating liquors. Other amendments of similar purport, *e.g.*, on the subject of child labor, have been urged though not adopted.

2. Development of implied powers

On the whole, however, formal constitutional amendment has played a relatively small part. Far more important has been the ever bolder and more diverse employment of implied powers, in legislation backed by the Supreme Court. Herein lies the national government's greatest resource, without which it could not possibly meet the people's demands upon it, and in the absence of which the constitution as adopted a century and a half ago would long since have gone the way of the Articles of Confederation. To be sure, the doctrine has sometimes, in the opinion of the courts, been stretched to the breaking point; and judicial decisions have more than once made it necessary to recede from ground to which the Supreme Court could not, for the moment at least, follow Congress. Nevertheless, the gains realized, from the days of Hamilton's bank to those of Roosevelt's Tennessee Valley Authority, have been immense; and the Court as at present constituted is conspicuously coöperative.

Especially fruitful in this connection has been the extension (on the basis of both express and implied powers) of *interstate* regulation to the

point where it is separated from *intrastate* control by only the thinnest sort of wavering line. In this, the national government has been abetted by the whole development of transportation, communication, and corporate industry on a nation-wide basis, rendering it increasingly difficult, if not impossible, to regulate interstate aspects without at the same time controlling intrastate phases with which they are intermingled. In their efforts to retain control over the railroads, telegraph and telephone lines, and radio systems within their boundaries, the states have long been waging a losing fight.

3. Expansion of interstate regulation

A fourth means by which national authority has been projected into the states is the assumption by the federal government of a share in the enforcement of state laws. Such an arrangement does not often arise, but a good illustration is afforded by the action of Congress in accepting the wild-game statutes of the states in lieu of laws on the subject which Congress would itself have no power to enact, with the result that, while state officials are of course not precluded from administering their local laws, federal officials participate by bringing to justice persons who transport or offer for transportation in interstate commerce game killed in violation of whatever laws the state concerned may have on the subject. Another instance is the very common commissioning of federal forest officers as state deputy fish and game wardens.

4. Federal enforcement of state laws

In various numbers of *The Federalist*, Hamilton and Madison expressed the opinion that the national government would rely heavily, if not mainly, upon state officials for carrying out its powers. In practice, there has been less such reliance than predicted; speaking generally, nation and states have maintained their own separate administrative personnel. From far back, however, federal elections have been conducted by state officers under state law, and state courts have nationalized aliens under federal law; and in later days state officials have had authority to enforce the federal Employers Liability Act and to assist in enforcing the Motor Carrier Act, the Pure Food and Drugs Act, the Wages and Hours Act, and (when they were in effect) the Volstead Act, the National Recovery Act, and the Agricultural Adjustment Act of 1933.¹ On several occasions, the courts have upheld the right of Congress to confer powers on officials of the states,² and although it is generally considered that such officials cannot be compelled in this way to act in a double capacity, the power has been exercised repeatedly, and thousands of officials have performed a wide variety of resulting duties. On their part, the states very commonly forbid stipulated (chiefly higher) officials to hold federal office if carrying a stipend. But the constitutional provisions invariably use the term "office" in a technical sense, leaving the way open for federal utilization of any and all persons on state payrolls

5. Federal use of state administrative officials

¹ The extensive federal use of state officials in wartime will be mentioned below. See p. 691 below.

² *E.g.*, *United States v. Jones*, 109 U. S. 513 (1883); *Selective Draft Law Cases*, 245 U. S. 366 (1917).

whose work is in the nature of *employment* rather than the holding of office.¹

6 Fed-
eratio-
research
as a
service
to the
states

Another widening channel of federal influence in the domain of the states is research. Simultaneously with the extension of government's long regulating arm into social and economic affairs, those affairs grew more complex and the problems relating to them more technical. For purposes both of enacting wise laws and achieving intelligent administration, a vast amount of painstaking investigation became necessary—much of it of a highly scientific character. Even a small town has need of the latest and best information on such matters as public health and education; and practically all state and more important municipal governments have set up agencies and spent money for investigative purposes. Localized research on this basis, however, has the disadvantage that frequently it cannot be pursued on such a scale as to yield the best results, and that, in any event, it involves wasteful duplication of effort. More and more, therefore, the country has come to rely upon the large-scale and ever-expanding research activities of the national government, even in fields like education which are not, except to a limited extent, within that government's jurisdiction. Utilized by the national government in its own ever-widening activities throughout the land, the results of large-scale investigative work carried on, for example, by bureaus in the Departments of Agriculture and Labor, the Bureau of Standards in the Department of Commerce, and the Office of Education under the Federal Security Agency, are turned to their own uses by the states and often become the basis for widely standardized state legislation and administrative policy.

7. Vol-
untary
federal-
state
coopera-
tion

Already it is apparent that, starting with extensions of federal power in compulsory forms, we have arrived at others of a more voluntary nature; no state, for example, is compelled to avail itself of the results of federal research. And this brings us to the significant matter of federal-state coöperation, deliberately undertaken, but nevertheless voluntary—even though sometimes with certain pressures applied. For such coöperation, a new atmosphere has happily been created. The old idea was that nation and states were necessarily competitive and perpetually in conflict. To this has succeeded, even in the thinking of the legally-minded Supreme Court, the concept of nation and states as having common interests and as capable of friendly coöperation for promotion of the general good. Of such coöperation there has come to be a great deal; and, among other results, it has carried federal influence (amounting sometimes to effective control) deeply into the realm of state affairs. In multi-

¹ The distinction having been noted, we may nevertheless, for convenience in the present discussion, refer to such persons as officers. Reciprocal employment of officials is treated at some length in J. P. Clark, "Joint Activity Between Federal and State Officials," *Polit. Sci. Quar.*, LI, 230-260 (June, 1936). Cf. A. N. Holcombe, "The States as Agents of the Nation," *Southwestern Polit. Sci. Quar.*, I, 307-327 (Mar., 1921); D. Fellman, "Some Consequences of Increased Federal Activity in Law Enforcement," *Jour. of Crim. Law and Criminology*, XXXV, 16-33 (May-June, 1944).

plying instances, such coöperation rests upon formal contracts or agreements, initiated by either party, and embodied in federal or state legislation (or both). The secretary of the interior, for example, is authorized to enter into contracts with any state with a view to education, medical assistance, and agricultural aid for Indians living in the state. The federal Bureau of Prisons can make agreements with state authorities for the care of federal prisoners. The Tennessee Valley Authority has an arrangement with seven states within its area for a joint program of agricultural development and water-shed protection. Starting with New York in 1928, nearly all states have relinquished their right to license airplane pilots flying solely within their boundaries, requiring them instead to take out federal licenses, and thereby turning a federal administrative service to state use. Congressional assent to interstate compacts is, of course, another illustration. On the other hand, such coöperation may be maintained simply as a matter of comity and without any legislative or other formal contract at all. Thus, many state agricultural experiment stations carry on investigative work in conjunction with bureaus of the federal Department of Agriculture. The Federal Bureau of Investigation aids state and local police forces through its finger-print service, its training school, and its uniform crime reports. State and local police may, and frequently do, join with federal authorities in apprehending violators of either federal or state law.

The advantages accruing from all such federal-state coöperation are many. In particular, (1) concurrent federal and state legislation may be virtually indispensable to well-rounded regulation of a given type of activity; (2) both nation and states may be enabled to profit reciprocally from administrative arrangements worked out, or even information furnished; and (3) the federal government may be enabled to acquire a wholesome supervisory or directive influence over activities of states, while still permitting some desirable independence of state and local planning and management.¹

Federal Financing of State and Local Activities

One of the most important means by which the national government has gained a hand in state (and of late also local) affairs, thereby further enhancing its own preëminence, takes the form of spending money for purposes of "federal assistance." During the depression of the thirties, the national government embarked upon heavy outlays in the states for provision of employment and other forms of relief—outlays made directly and without the intervention of state authorities. With better times returning, and employment at length rising to top levels as a result of the defense effort launched in 1940 and the later war (starting in 1941), it

Two
main
forms

¹ J. P. Clark, *The Rise of a New Federalism; Federal-State Coöperation in the United States* (New York, 1938); E. S. Corwin, "National-State Coöperation; Its Present Possibilities," *Yale Law Jour.*, XLVI, 599-623 (Feb., 1937).

became possible to taper off this form of assistance, of which in fact relatively little now remains.¹ The federal assistance with which we are here concerned is of a more permanent nature—the “grant-in-aid,” as commonly termed, under which federal money, earmarked for particular activities, is turned over to state treasuries to be expended by state agencies, or is paid to such agencies directly, or even nowadays to local governments. Federal assistance in this form has become a regular feature of our governmental system.²

Earlier
grants of
land and
money

Grants by the national government to the states are no novelty in our time. Beginning with Ohio in 1802, Congress made a regular practice of bestowing on newly admitted states land within their boundaries equivalent to one section in every township, to be used for the development of permanent school funds—in fact, two sections after 1848, and even four in the cases of Utah, Arizona, and New Mexico. In the famous Morrill Act of 1862, it set aside still more land for the benefit of the states,³ stipulating that the proceeds should be used by each in endowing and maintaining one or more colleges “devoted primarily, although not exclusively, to instruction in “such branches of learning as are related to agriculture and the mechanic arts”; and funds derived from this source help support our “land-grant” colleges today. Not only land, but also money (in periods of surplus revenues), was bestowed in earlier times; and not only for education, but also for roads and canals.

The
newer
type of
condi-
tional
grant

In later decades, a new form of *conditional* grant gained large fiscal, administrative, and social importance. As a “grant-in-aid,” its cardinal principle is that Congress will appropriate money for the promotion of a specified service or activity carried on by the states, apportioning the sum for any given purpose among the whole number of states on some fixed basis, but permitting a state to share in the subvention only, as a rule, on four conditions—(1) that the state shall spend the federal money only for the exact purpose stipulated and under whatever conditions may have been laid down; (2) that the state itself, or its subdivisions, shall make concurrent appropriations for the purpose in hand (usually in amounts at least equal to its share of the national grant); (3) that the state shall create, or at all events maintain, a suitable administrative agency with which the federal government can deal in relation to the function to be performed; and (4) that, in return for the assistance received, the state shall recognize the federal government's right to interpose regulations, fix standards, and inspect results. Often, of course, it will be necessary for states to enact new legislation in order to qualify for sharing in such a grant; almost always, administrative

¹ In 1944, the Work Projects Administration, the National Youth Administration, and other well-known agencies employed in this connection were in process of liquidation.

² The purely local aspects of the matter are considered on pp. 103-104 below.

³ Allotted in the proportion of thirty thousand acres for every senator and representative that a state had in Congress.

machinery will have to be reconstructed so as to open a way for supervision by national officers over activities that previously—if undertaken at all—were entirely in the state's own hands. No direct compulsion is exercised. A state may, if it likes, decline to meet the conditions imposed, in which event it simply does not participate in the federal subsidy; and this voluntary aspect of the plan has been of great help to the courts in getting around the constitutional difficulties which some of the legislation, dealing with matters far out on the rim of federal authority, presents. Compliance by the states is, however, less voluntary than appears. For the federal funds represent the proceeds of taxes paid by the people of the entire country, and if any state refuses to go into a given arrangement, it thereby cuts itself off from the benefits which its taxpayers are helping to bestow on the states that go in. Naturally, it will be reluctant to do this. Here, as elsewhere, the power of the purse usually prevails; and the same considerations that initially induce a state to accept its share of a given grant impel it to live up to the standards and specifications required rather than run the risk of having its subvention withheld.

Prior to the depression of the thirties, federal grants-in-aid, although significant, were on a relatively modest scale. In 1920, they aggregated only \$37,600,000; in 1930, approximately \$135,000,000. By 1937, however, the states, as a group, were deriving more of their revenue (fourteen per cent) from this source than from any other except gasoline taxes (fifteen per cent) and general sales taxes (sixteen per cent); and in the fiscal year 1939—notwithstanding the great growth in the meantime of assistance of the "direct" type—grants of the kind were made for no fewer than twenty-one different state or local purposes, while the total outlay mounted to \$582,519,000—an increase of more than three hundred per cent in ten years.¹ Only a few of the principal forms which such grants have assumed can be mentioned here.

In 1916, a National Defense Act,² carrying farther the invasion of state autonomy begun by a Militia Act of 1903, discarded the old term "militia," substituted the significant name "National Guard," and welded the various bodies of state troops into a unified, nationally organized force auxiliary to the national Army and closely tied in with it. Liberal federal aid is extended on condition of substantial federal control, and federal standards of equipment, training, and discipline are rigorously enforced. As an organized militia, the National Guard still serves the states; but it has likewise become (as its complete mobilization by the national government in 1940 so forcefully illustrated) an integral part of the war machine of the nation.³

1. Defense—the National Guard

¹ The total for 1941 (the last year before the war disrupted activities like highway construction) was \$851,005,000 (including \$95,850,000 to local governments and \$10,989,000 to the territories).

² 39 U. S. Stat. at Large, 197.

³ See Chap. xxxv below.

² Highway
ways

A Federal Aid Road Act of 1916¹ provided for appropriations rising by stages to the sum of \$25,000,000 in 1921, to be expended by the Bureau of Roads (then in the Department of Agriculture), in coöperation with the highway departments of the several states, in the construction of rural postroads; and the innovation was introduced of requiring the states to match evenly the amounts allotted to them from the federal treasury. As was to be expected, the scheme proved popular in an automobile age. Every state accepted the provisions of the act; the national grant (distributed according to three equally weighted factors—area, population, and rural delivery route mileage) was increased repeatedly, reaching \$161,730,958 in 1939;² and under the federal impetus, road construction went forward on a scale never before witnessed in this or any other country. State highway legislation, conforming to federal requirements, grew voluminous; and state indebtedness incurred in carrying out the joint program rose in some instances to alarming proportions.³ Originally limited to \$15,000 a mile, federal participation was later permitted to a maximum of \$25,000; and funds might be expended on secondary as well as major highways, and likewise on the elimination of hazards at railroad grade crossings.⁴ One will not be surprised to learn that the program took quite a new turn after the outbreak of war in 1941. Construction projects then under way were indeed allowed to be completed. But federal aid was thereafter restricted to new projects certified by the War or Navy Department as being essential to the conduct of the war; and while states were required, or for some purposes merely encouraged, to contribute, the earlier formulas were abandoned and most of the costs were borne by the national government. Non-military road-building almost completely ceased. Resumption of such building on a large scale after the war is, however, contemplated, and in December, 1944, a measure became law appropriating \$500,000,000 a year for each of three postwar years for federal aid in the construction of interstate highways, secondary or "feeder" roads, and highways in metropolitan areas.

³ Social
welfare

With a view to putting the great mass of the people eventually in a position to weather economic stress in a fashion impossible in the existing period of crisis, the Social Security Act of 1935⁵ instituted a broad permanent program of social welfare financed by payroll taxes and

¹ 43 U. S. Stat. at Large, 653.

² This, however, was only twenty-seven per cent of the total of all grants, as compared with fifty-four per cent for the purpose in 1930.

³ Notwithstanding that during the worst depression years state contributions were largely waived.

⁴ For this last-mentioned purpose, the states have not been required to match federal grants. The supervising federal authority is now the Public Roads Administration, in the Federal Works Agency. During the depression, direct federal expenditure for work relief projects was extended generously to state and local highway-building, quite apart from and in addition to grants made on the conditional "fifty-fifty" basis. In many states, by 1939, the federal government was contributing more for highway purposes than state and local governments combined.

⁵ 49 U. S. Stat. at Large, 620. See pp. 620-624 below.

federal grants-in-aid. To start with, a nation-wide scheme of unemployment compensation—while supported fundamentally by funds raised from contributions of employees and employers—is administered in the states at the joint expense of states and nation, under conditions prescribed in part by the latter. For provision of assistance to the needy aged, federal aid is granted to the extent of one-half of the total expenditure in each state.¹ Grants-in-aid of activities relating to homeless, dependent, and neglected children, maternal and child health, child welfare, and crippled children in effect revive and extend provisions of the Sheppard-Towner Act of 1921 (allowed to lapse in 1929), and are administered mainly by the Children's Bureau in the Department of Labor. Still other features of the law provide subventions for the improvement of state and local health services, increase the aid given for vocational rehabilitation, and introduce similar assistance in paying pensions to the blind. One would be justified in saying that this monumental piece of legislation proceeds from the premise that henceforth social security and well-being in this country are to be the joint concern of the federal and state governments, with the former (it may safely be added) furnishing much of the money, largely determining how it shall be spent, and therefore holding the whip-hand.

From 1911, the federal government incurred small direct expenditures in the states for forest-fire protection, and in 1924 it instituted contributions on a grant-in-aid basis, with activities extended to include the distribution of forest plant stock among farmers. Grants on the same basis for the support of agricultural experiment work contributing primarily to the conservation of resources began as early as 1887, and for support of various forms of agricultural extension work in 1914.²

4. Con-
servation
of na-
tional
resources

Although education has traditionally been looked upon as a state and local function, federal aid, as we have seen, started at a very early date in the form of grants of land for school purposes, including those later provided for in the Morrill Act of 1862 and aimed at promoting vocational education in the fields of agriculture and the mechanic arts. The federal grants-in-aid for the support of agricultural experiment stations and extension services referred to above have, of course, their educational, as well as their conservational, aspects; and further provision for vocational education, on a grant-in-aid basis, and in the fields of agriculture, trade, industry, and home economics, was made in the Smith-Hughes Act of 1917, with numerous later increases of the amounts expended.³

5. Edu-
cation

¹ A vast system of old-age and survivors' insurance (to be distinguished from mere provisions for old-age assistance out of public funds) is designed to carry its own load from payroll taxes and hence has no federal-aid features. See pp. 622-623 below.

² See pp. 569-570 below.

³ Somewhat related is the Vocational Rehabilitation Act of 1920 giving the states assistance, on a fifty-fifty basis, in guiding, training, and replacing persons injured in industry or by disease. As noted above, the Social Security Act of 1935 increased the federal subvention for this purpose.

Financial difficulties of both urban and rural areas during the depression of the thirties seriously affected school systems and prompted demand for federal grants-in-aid in behalf of elementary and secondary education generally. The depression passed. But wartime experience—particularly a serious scarcity of teachers—shortly lent the movement new force; and, with organizations like the National Education Association pressing for action, a bill authorizing federal grants to the states aggregating \$300,000,000 a year in time of war or other emergency and \$100,000,000 a year in ordinary times was debated in Congress in 1942 and 1943 and reintroduced in 1945. Defended as essential if poorer states were to be enabled to pay teachers and provide equipment on a scale comparable with more favored ones, and indeed if some state school systems were to be saved from utter breakdown, the proposal was resisted as an opening wedge for educational “federalization” and as inappropriate in a period of staggering federal deficits. Becoming entangled also with the question of safeguarding the distribution of funds against discrimination on grounds of race or color, the proposed legislation failed of enactment. There is, nevertheless, probably no point at which our existing grant-in-aid system is more likely in time to be expanded.¹

A phase
of a
general
trend

The rise of the present towering structure of federal financial assistance to states and local areas is no isolated phenomenon. Practically every modern government has found it increasingly necessary to extend central aid to subordinate governments;² and our system of federal assistance is paralleled by similar systems of state aid to local units. Fundamentally, the explanation in our country is the decline of the general property tax³ in a period of swiftly increasing outlays, especially upon relief and recovery projects, upon more permanent social services, and of late upon wartime activities. Adequate new sources of local revenue not having been found, state governments, and ultimately the national government, have been compelled to come to the rescue. Starting with only a few small scattered grants a generation ago, the federal grant-in-aid system has grown into a huge device of joint financing, basic to the fiscal operations of nation and states alike, and, for better or worse, reversing much of the decentralization of earlier days.⁴

At all stages, the grant-in-aid policy has been opposed vigorously on such grounds as (1) that under it the national government practices a

¹ It is significant that an expert Advisory Committee on Education, appointed by President Roosevelt in 1936 and reporting in 1938, recommended extension of the grant-in-aid principle to elementary and secondary instruction, particularly for the benefit of the Southern states. *Report of the Advisory Committee on Education, Floyd W. Reeves, Chairman* (Washington, D. C., 1938). Cf. “Should Financial Aid Be Extended to Public Schools” [Symposium], *Cong. Digest*, XXIII, 35-64 (Feb., 1944).

² On the vast system of grants-in-aid built up in Great Britain during the past hundred years, see H. R. Bowen, *English Grants-in-Aid; A Study in the Finance of Local Government* (Iowa City, 1939).

³ See pp. 839-845 in complete edition of this book.

⁴ For a full statistical picture of the grant-in-aid system, see Council of State Governments, *Grants-in-Aid and Other Federal Expenditures within the States* (Chicago, 1945).

species of bribery, *i.e.*, in effect buys the right of compelling and supervising activities over which it otherwise would have no control; (2) that the system coerces the states (however gently) into overloading themselves with expenditures and obligations, and may also tend to unbalance state programs in other ways; (3) that it encourages manipulation and vote-trading in Congress for special favors for particular causes or interests; (4) that it tends to create masses of voters dependent on federally aided enterprises, thereby assuring the party in power an unfair initial advantage in elections; (5) that, in addition to depriving the states of their proper powers, it begets the habit of relying on doles, encourages the demoralizing notion that the government at Washington owes every business and profession a living, and if adhered to "means the gradual break-down of local self-government in America"; (6) that "federal aid" is a misnomer, since all that the federal government does is to take money from the people of the states in the form of taxes, put it in the general fund, draw it out again, and give it back, in proportions not always easy to justify; (7) that the richer states—in which opposition to the policy has largely centered—are made to bear most of the burden and progressive states are penalized for the benefit of more backward ones; and (8) that, if grants are to be made at all, they might better be "block," or lump-sum (rather than functional) grants, to be spent by the states entirely at their own discretion.

Some
common
argu-
ments:

1 In
criticism

To all this there has been, of course, a rebuttal, running somewhat as follows: (1) the system encourages the states to undertake social services which many of them otherwise would ignore or feel that they could not afford; (2) it enables minimum national standards to be set up in fields of social and economic regulation in which the people of the entire country have a vital interest; (3) it divides burdens which states are often unable to bear alone, quite justifiably requiring the richer states to help the poorer ones improve conditions in which all have a large common concern; (4) it makes for economical expenditure of federal funds, and, by imposing reciprocal obligations, checks the scramble for public money which frequently takes place when such money is bestowed without imposing local responsibilities, as has been the practice, for example, in making river and harbor appropriations; (5) the initiative and responsibility left to the states keep the scheme elastic and furnish all necessary safeguards against undesirable dictation from Washington; and (6) except at certain points, no state is obliged to subject itself to the operation of the system unless it desires to do so.¹

2 In
defense

¹ Whatever else may be said, the device undeniably has opened a way for (1) improvement of state personnel practices, through authority conferred in 1939 on the Social Security Board to require of the states, as a condition of receiving grants under the Social Security Act, that they establish and maintain merit systems in their unemployment insurance and public assistance agencies (see pp. 621-623 below), and (2) curtailment of the political activities of large numbers of state and local officials and employees—all (under the second Hatch Act, see p. 439 below) whose compensation is derived in any degree from the federal government.

Some
major
facts

From the medley of arguments certain great facts emerge. (1) The grant-in-aid system is here to stay. Not only so, but it will continue to grow in magnitude and importance. Even if it should not be extended into new fields of governmental activity, existing grants—especially for maternity and child welfare, public health, and other social services—will almost certainly mount to higher levels. New extensions, however—as for example in the domain of education—are practically inevitable. (2) The time-honored objections to the system still hold with many people; yet, speaking broadly, opposition has melted away. Specific proposals draw attack, but usually only because the critics would like to deflect attention to different ones. The Supreme Court is committed to the grant-in-aid principle;¹ and so far as one can see there is no limit to the lengths to which grants may in future be carried except only the resources of the United States Treasury. But (3) there is urgent need for a more coherent policy relating to the matter, and for better federal supervision and administration. One almost may say that up to now there has been no policy at all. Not all major state services, nor even all of those most affecting national interests, are subsidized; and, speaking broadly, those that have been selected for subsidy are simply the ones that have profited from the largest, most vocal, and most persuasive lobbies in the national capital. Twenty years ago, this did not greatly matter; subsidies were few and small. But the mammoth proportions lately assumed, with prospects for still farther growth, call loudly for a thoroughgoing appraisal of the entire situation, to be followed by more or less formal adoption of a general, consistent, and rational line of policy under which existing and proposed grants would be tested by accepted norms and cut off, reduced, increased, or refused according to principle rather than simply as dictated by whim or by pressure group. Similarly, the federal government's rôle of inspection and supervision should be discharged more consistently and efficiently than at present; and for bringing this about, more adequate financial provision should in certain cases be made.²

Direct Federal-Local Relations

One rather recent aspect of federal aid has yet to be emphasized, *i.e.*, the extension of such assistance by the national government directly to

¹ *Massachusetts v. Mellon* and *Frothingham v. Mellon*, 262 U. S. 447 (1923), in effect sustaining the Sheppard-Towner Act of 1921 and by inference the grant-in-aid system generally; also cases cited on p. 624, note 4, below, sustaining the Social Security Act of 1935.

² For various books dealing with federal aid, see p. 115 below. Cf. especially G. C. S. Benson, *The New Centralization*, Chap. vi. Arguments against the system are presented cogently in C. Warren, *Congress as Santa Claus* (Charlottesville, Va., 1933). From a vast periodical literature may be selected A. F. Macdonald, "Recent Trends in Federal Aid to the States," *Amer. Polit. Sci. Rev.*, XXV, 628-634 (Aug., 1931), and "Federal Aid to the States: 1940 Model," *ibid.*, XXXIV, 489-499 (June, 1940); J. P. Harris, "Should Grants-in-Aid Have a Policy?," *State Government*, XIII, 107-108, 115-117 (June, 1940). The files of the last-mentioned journal contain a good deal of material on the subject.

local units or authorities; and this leads to a word of comment on the relations between federal and local governments generally. The theory of our scheme of governmental levels is that cities, counties, and other local units shall have contact with the national government only through the states as intermediaries. To be sure, this principle was never applied rigidly; nor can it be, since, after all, it is upon the people of the localities that the federal government operates and to them that it renders its services. Its Bureau of the Census gathers and reports information which is used by cities and counties, and similarly its Office of Education; its Public Roads Administration works on problems of street construction no less than of state and federal highways; it furnishes its fingerprint service to all local law-enforcement officers who desire them; its Bureau of Standards has worked out model city-planning and zoning laws; the Tennessee Valley Authority sells power and other services to scores of municipalities; and one could go on indicating literally dozens of ways in which contacts are maintained. Until somewhat recently, however, nearly all of these relationships were of a more or less informal and even casual nature, not involving much, if any, regulative authority, and certainly not entailing grants of federal money.

Traditional
federal-
local
contacts

But there has been a change. If a city now desires to borrow funds for some local undertaking, its bond issue must be approved by the federal Securities and Exchange Commission; if it owns a power plant, it must accept regulations at the hands of the Federal Power Commission, and similarly, in the case of an airport, from the Federal Civil Aeronautics Authority. More than that: counties and cities are now receiving and disbursing funds coming to them directly out of the federal treasury and not channeled through state agencies. In the states that have so authorized, counties are the recipients, under the Social Security Act, of federal funds for old-age assistance, aid to dependent children, aid to the blind, and public health work. Through the soil conservation service of the Department of Agriculture, the federal government financially assists local soil-conservation districts in their soil-conservation and erosion-prevention activities.¹ County agricultural agents are usually appointed by the county board, but are paid partly by the federal government, to which they naturally bear some responsibility. During the depression decade, cities all over the country participated in federal grants and loans for waterworks, sewerage, street improvements, and public buildings, and federal money was made available to city housing authorities. Insolvent cities, too, were given means of reaching agreements with their creditors in federal bankruptcy courts. Frankly recognizing the new situation, the city of Cleveland went so far as to create an office of "commissioner of federal relations."

Newer
aspects—
financial
assistance

To a considerable extent, the swing in this direction was a depression

¹ Once formed with state guidance, these districts pass entirely out of state control and deal with the federal government only.

experience; lacking, as many of them did, the vitality and leadership requisite to cope with the tragic conditions of the period, the states were obliged (and relieved) to see the national government step in and do what they appeared incapable of doing to create employment and repair disaster. After the emergency passed, direct federal aid to localities was at some points reduced, and at others discontinued. Some of the new connections, however, *e.g.*, in the domains of social security and agriculture, have been continued; others, incident to the war, and noted below, have come into the picture; and in so far as federal-local relations—whether or not originating with the depression—are so conducted as to “by-pass,” or “short circuit,” the states, the traditional federal-state equilibrium tends to be upset in the federal government’s favor; although fairness requires it to be added that, in general, due regard for state constitutions and laws has been shown and local authorities have not been put in leading strings from Washington.¹

Some Wartime Developments

Relation
of the
states
and local
units
to war

When the constitution prohibits states to “engage in war” unless actually invaded or in imminent danger of invasion, it refers only to war which they might make by their own authority; once war is entered upon nationally, they are expected to “engage” in it, not indeed by separate military or naval action, but by extending support and coöperation at every point where the general war effort can be served. Even before our entrance into World War II, states and localities were drawn into many activities related to preparations for defense, and during the conflict itself their governments were steadily occupied with making laws and regulations aimed at wartime needs, coöperating with national authorities in carrying out mobilization and other programs, and eliminating impediments hampering the most effective prosecution of hostilities. For the most part, the ways in which states, counties, and cities thus served the cause must be reserved for comment in later chapters devoted to the subject of national defense.² But a word is pertinent here concerning some intergovernmental relationships involved.

Guiding
Prin-
ciples
during
World
War II

To begin with, certain key principles dominated throughout. One was that the division of authority incident to federalism should not be allowed to impede the war effort, but rather should definitely be turned to account in promoting it; and another, that, in general, nation, states, and localities should be trusted to carry on necessary wartime activities primarily

¹ On the development of federal-municipal relations during the depression, see *Nat. Mun. Rev.*, XXV, 452-464 (Aug., 1936). Cf. IV. Kilpatrick, *Federal Relations to Urban Government* (Washington, 1939), I, Pt. 2. Under the auspices of an unofficial Council on Intergovernmental Relations, experiments in “blending more harmoniously the powers and interests of the federal, state, and local governments in the execution of their common purposes” were instituted in 1943-44 in three counties selected as being typical of their respective regions, *i.e.*, Blue Earth in Minnesota, Henry in Indiana, and Colquitt in Georgia. See J. O. Walker, “Experiments on Ways of Improving Local Administration,” *Pub. Management*, XXVI, 23 (Jan., 1944).

² See Chaps. xxxiv-xxxv below.

on a basis of mutual and willing coöperation. To be sure, federalism could not be brushed aside by the mere existence of war; nor could useful collaboration be attained without planning, conference, and direction. The over-all picture that one gets, however, is that of a nation correlating and concentrating its war energies with almost, if not quite, the force and effectiveness achieved in, for example, Great Britain, where no federal problems were involved. Where friction, hesitation, and delay arose, they at least did not, by and large, spring from difficulties between governments on the different levels.

What were some of the things that happened? Only four or five can be singled out for mention. (1) Various state laws or regulations found to be interfering with maximum war effort were rescinded or suspended. A good illustration is afforded by transportation. Finding that numerous state regulations on such matters as weight-loads were interfering with the trucking of war materials, President Roosevelt appealed to the governors and was rewarded with a prompt agreement of all the states to abide by uniform standards of motor transport for the duration. When the conservation of rubber resources became urgent, all states waived their speed-limit laws and accepted a nation-wide limit of thirty-five miles an hour. When railroad transportation of passengers and freight began to be threatened with serious congestion, the Interstate Commerce Commission, acting under emergency provisions of existing law, ordered all roads under its jurisdiction to operate their trains without regard to state laws governing the length of, or number of cars in, a train. (2) Both state and local governments fell in willingly (although the administration of priorities under the War Production Board would have brought the same result in any case) with a federal policy of avoiding the construction of public works which would eat into the supply of labor and materials. (3) In several important fields, a huge war program, prescribed and regulated by federal law, was administered by state and local authorities with only general supervision from Washington. One of these was the selective service. Another was civilian defense. And still others were rationing and price control. In the case of selective service, for example, every governor was responsible for the administration of the law in his state, and the actual work was performed by a corps of officials starting with a state director at the top and reaching down to the local "draft boards" in the counties. (4) Significant new turns were imparted also to direct federal-local relations. Enormous expansion of the munitions industry led to the rise of literally hundreds of "boom towns" throughout the country, throwing upon older municipalities suddenly transformed, but especially upon new ones springing up over night, burdens (for schools, hospitals, water supply, fire protection, police, and what not) with which they were unable to cope. Recognizing its own primary responsibility for the situation, the federal government met insistent demands from the localities concerned by financial assist-

Some
wartime
intergov-
ernmen-
tal
relations

ance in the form of loans or outright grants, or in some cases by federal construction and lease to the municipalities involved. Federal-local relations in the domain of housing, already developed to some extent when the war began,¹ received special impetus; and a rent-control program, directed by the Office of Price Administration, was introduced.

An uncertain outcome

The developments mentioned must suffice as illustrations of the sorts of things that have been going on during the war period in the field of intergovernmental relations. There has, of course, been—as there must be in wartime—a great deal of centralization of authority over both men and materials. But, significantly, there has been also much decentralization; an extraordinary amount of our wartime administration, indeed, has been local, as evidenced by the draft boards, ration boards, local defense councils, and other agencies. It is still too early to know what the long-term effects of the entire experience will be. But one may anticipate that they will not be exclusively in the direction of either greater centralization or the reverse. Certainly the states do not regard themselves as having surrendered powers for all time to come. The prevailing sentiment among them has been, rather, that they should be asked to turn over to the national government only those controls actually and directly necessary to the winning of the war, and that, the war once over, all controls thus relinquished should come back into their hands. That they will actually regain everything is unlikely; war can hardly fail to impart lasting momentum to a centralizing tendency already strong in previous decades of peace. The heavy reliance of the federal government for war purposes upon the states as such, and upon their urban and rural subdivisions, is, however, favorable to a restoration, broadly, of the earlier balance. Certainly the coöperativeness shown by governments on all levels, not only in the face of the economic emergency of a decade ago, but also when confronted by the present war emergency, has afforded an impressive demonstration of the vitality and adaptability of the American federal system.²

The General Problem of Centralization

If there is any time-honored public question in the United States, it certainly is that of "centralization"; loose constructionists and strict constructionists were discussing it before the constitution had been in operation a twelvemonth. An old question it may be, but also ever new; and no one needs to be told that fierce fires of controversy have raged around it in the past three decades of rapidly growing federal power, and particularly in the era of emergency and reform measures associated with the New Deal. Nor does any one need to be told that the issue will again be acute after the present war.

¹ See pp. 626-627 below.

² For fuller discussions, see L. V. Howard and H. A. Bone, *Current American Government; Wartime Developments* (New York, 1943), Chap. xiii; A. W. Bromage, "Federal-State-Local Relations," *Amer. Polit. Sci. Rev.*, XXXVII, 35-48 (Feb., 1943).

On the one hand, it is argued (1) that the only feasible plan for a land of continental proportions and a people of vast numbers and divergencies is one—such as the makers of our constitution had in mind—which allows a large measure of local and regional autonomy and restricts centralized, uniform, national control over social and economic matters to a minimum; (2) that even if Congress has the constitutional right to extend its regulating activities in certain of the present and proposed directions, it is not wise, or even safe, for it to insist upon going farther than it has already gone, especially in the broad domain of the police power, once supposed to be occupied mainly or entirely by the states; (3) that the national government has already (especially under the Roosevelt régime) become overgrown, top-heavy, unwieldy, with the people in danger of finding themselves hopelessly weighed down with a vast, professionalized federal bureaucracy, indifferent to the ways of democracy; (4) that in many large domains the state governments are still the more natural and effective agencies of control, because closer to the problems involved and especially to the people concerned; and (5) that in seeking to enforce uniform standards through an ever-widening network of federal law, backed up by steadily expanding federal administrative machinery, the national government is strangling the states and reducing them to mere local areas charged only with “the neat and humble care of detail in obedience to a nationally determined policy.”¹

Criticism
of the
present
trend

As opposed to all this, it is contended (1) that time, inventions, and other forces have so thoroughly nationalized the United States that most fundamental social and economic interests are no longer local, but instead cut across state and sectional boundaries, and are of common concern to the entire country; (2) that along with this great change of conditions has gone a corresponding change of political thought, so that people no longer expect or desire the state or regional autonomy that prevailed in earlier and simpler days, but, on the contrary, are prepared to see the *competitive* federalism of the past give way increasingly to the *coöperative* federalism of the future; (3) that the states have not been so efficient as to have demonstrated their right to be let alone in matters of wide national concern; and (4) that so long as social and economic conditions arise which, if they are to be regulated at all, must be regulated by the national government, it is of no use to say that the national government is unfitted to take on more responsibilities, the

Counter-
argu-
ments

¹ In the presidential campaign of 1944, the Republican party, and in particular a group of Republican state governors (including the party's candidates for both the presidency and vice-presidency) warmly advocated a rehabilitation of states' rights, so seriously invaded, it was alleged, by the policies and actions of the New Deal. In view of this, it is interesting to recall that twelve years previously, Franklin D. Roosevelt (himself a governor at the time) campaigned for the presidency by assailing the Republicans for “committing themselves to the idea that we ought to center control of everything in Washington as rapidly as possible.” One would not be far wrong in concluding that the “ins,” whoever they are, are likely to incline to federal centralization and the “outs”—at least as long as they remain “outs”—to be critical of it.

proper course being, rather, to reconstruct that government so as to remedy the deficiency, if it exists.

Broad
conclu-
sions

Here again, out of a wealth of *ex parte*, and often emotional, argument arise certain conclusions. The first is that the subject is not one upon which to dogmatize. The proper attitude is not a generalized opposition or a generalized support, but willingness to consider each proposed extension of national activity on its own merits. A second point is that centralization and decentralization are not mutually exclusive principles, only one of which can be adhered to at a given time. Large business establishments have found that efficiency requires uniformity and concentration in certain of their operations and quite the reverse in others. So it is with governments. A high degree of centralization in one field is entirely compatible with no centralization at all in other fields. In the third place, the growth of national control—quite apart from the special circumstances that have stimulated it so powerfully in this country during the past twelve or fifteen years—is inevitable, however one may feel about it. It is the universal experience, once national unity has been attained; and the device of federalism can no more prevent it in the United States than in pre-Nazi Germany, Switzerland, or other countries that started with highly decentralized systems. Let social and economic interests develop to a point where they are no longer bounded by state lines, but are of regional or national concern, and any attempt to keep up a monopoly of state regulation not only is hopeless, but, if persisted in, is certain to precipitate damaging conflicts between state power and national power. "The outcome of such a conflict can never be long in doubt. The greater will prevail over the lesser."¹

The Outlook for the States

Some
serious
charges

What, then, of the states? Are they to be completely overborne by the advancing supremacy of the national government? Have they become so enamored of federal aid as to have lost their constitutional vigor and self-respect? Notwithstanding the wartime vitality lately displayed, there are those who think so; indeed, there are those who look hopefully to the day when the "waste and confusion" of forty-eight separate state governments will be no more.² Charges are brought that, as constituted geographically, the states, speaking generally, do not correspond to economic or social unities; that provincial viewpoints of their populations and restrictive clauses in their constitutions too often prevent them from cooperating for the public well-being, either with one another or with the national government—in a period, too, when public problems are increasingly taking on a nation-wide aspect; that often they do not deal wisely with even their purely internal affairs. And remedial proposals include such drastic suggestions as (1) redrawing the map

¹ W. MacDonald, *A New Constitution for a New America*, 169.

² See W. Y. Elliott, *The Need for Constitutional Reform*, Chap. ix.

of the country so as to bring state boundaries into better accord with the present distribution of population, and with other social and economic conditions; (2) displacing the states, largely or wholly, with a smaller number of political divisions (perhaps eight or nine) laid out to correspond to socio-economic *regions*; (3) virtually scuttling the federal system by amending the constitution so as to give the national government unlimited police power to legislate on health, safety, morals, and the general welfare.

Certain
proposed
remod-
ifies:

A word may be said about each of these suggestions. The point to the first is not simply that the present forty-eight commonwealths are extremely unequal in area, population, and resources; of itself, this does not seriously trouble anybody except a few people who profess to worry about the equal representation of the states in the United States Senate.¹ The matter of concern is, rather, that most state boundary lines are purely artificial and the resulting divisions consequently often lacking in topographic, social, and economic unity. More than one person has amused himself by working out a system of state boundaries presumed to be more in accord with the present-day actualities of population, social viewpoint, and economic interest.² In particular, a great deal has been said, and with considerable plausibility, in behalf of organizing metropolitan areas like New York, Philadelphia, Chicago, and Detroit into separate states, which, as such, would be free from the "upstate" or "downstate" restraint and domination that nowadays give rise to so much friction and dissatisfaction.³ California might be divided into northern and southern commonwealths (even though such a division of Dakota is of questionable value); Texas might be split into any number of states up to the five envisaged as a maximum by the joint resolution of admission in 1845; the surveyor's line between Vermont and New Hampshire might simply be erased. Other possibilities suggest themselves, with, in some cases a certain attractiveness—until one recalls the stentorian injunction of the constitution that no new state may be erected within the jurisdiction of any other state, nor formed by the union of two or more states or parts of states, without the consent of *the legislatures of the states concerned* as well as of Congress. How—things being as they are—such consent could be obtained in cases like those mentioned, no one has as yet risen to explain. In general, the proposal, therefore, is not very realistic.

1. Re-
drawing
the map
of the
states

A second suggested line of attack primarily by way of geography is even more radical, contemplating as it does the displacement of the states

¹ See pp. 259-260 below.

² See, for example, a map in *Chicago Tribune*, Jan. 5, 1930, pt. 11, p. 5.

³ The arguments for separate statehood are particularly cogent when, as in the cases of New York and Chicago, the metropolitan area extends into two or more states. See W. B. Graves, *Amer. Polit. Sci. Rev.*, XXX, 41-45; and for an argument for statehood for the Chicago area, C. E. Merriam, S. D. Parrott, and A. Lepawsky, *The Government of the Metropolitan Region of Chicago* (Chicago, 1933), 179-180. The objection to statehood for cities most often heard is that it would undermine the tax structure of the state or states affected by withdrawing the areas of greatest taxpaying capacity.

2. Re-
placing
the states
with
"regions"

largely or wholly by regional commonwealths of larger size and essentially different nature. The idea is that with state boundaries erased, or at best preserved as lines having merely historical associations, it would be possible to cut the country into a number of broad areas having genuine unity, and for the governments of such areas to function more economically and efficiently than do the present set of state governments. Years ago, a leading historian, Frederick J. Turner, wrote: "We in America are really a federation of sections rather than of states. State sovereignty has never been influential except as a constitutional shield for a section. In political matters, the states act as groups rather than as individual members of the Union. They act in sections and are responsible to the respective interests and ideals of these sections."¹ Translating "section" into "region," the National Resources Committee, in a report submitted in 1935, proposed ten or twelve regions of a socio-economic nature as a basis for national planning and for coördination of federal administrative services.² The Committee expressly disclaimed suggesting any new form of political jurisdiction; the states were to go on as before. But numerous writers, showing less restraint, have proposed and advocated regionalism as a more or less complete substitute for the present state system. Only by such a change, asserts one who has already been quoted, can our "drooping federalism" be revived and the steady march of centralization be stayed.³ Proponents naturally do not agree upon the number of regional commonwealths to be devised, upon their boundaries, or upon their powers and functions. The number most commonly suggested is nine;⁴ the particular area most frequently marked off as one of the series is New England. Even more surely, however, than the plan of merely rearranging state boundaries, the scheme of erecting new regional governments is, for an indefinite time to come, relegated to utopia by state pride—to say nothing of constitutional restraints.⁵

3 Full
police
power
for the
national
govern-
ment

The third proposal mentioned approaches the problem, not geographically, but functionally. One of the main criticisms of the states is that many of them are hesitant or negligent about enacting progressive legislation on subjects like public health and industrial relations—matters supposedly withheld by the constitution's framers from the national government on the theory that they are so closely bound up with local ideas and economic conditions that they ought to be regulated state by

¹ "Sections and Nation," *Yale Rev.*, XII, 1-21 (Oct., 1922), 6. Cf. the same author's *The Significance of Sections in American History* (New York, 1932).

² *Regional Factors in National Planning and Development* (Washington, 1935).

³ W. Y. Elliott, *op. cit.*, 185. A. Hehmyer, *Time for Change* (New York, 1943), Chap. xi.

⁴ See, for example, W. K. Wallace, *Our Obsolete Constitution*, 185.

⁵ Extended discussions of regionalism include H. W. Odum and H. E. Moore, *American Regionalism; A Cultural-Historical Approach to National Integration* (New York, 1938); and D. Davidson, *The Attack on Leviathan; Regionalism and Nationalism in the United States* (Chapel Hill, N. C., 1938). Cf. W. B. Munro, *The Invisible Government* (New York, 1928), 136-164; H. W. Odum, *Southern Regions of the United States* (Chapel Hill, N. C., 1936); and National Resources Committee, *The Future of State Planning* (Washington, 1935).

state rather than nationally. Authority to deal with things of this sort is commonly known as the police power; and the national government has been supposed to be devoid of such power. To be sure, Congress has enacted a number of laws clearly falling within the area;¹ and recent decisions of the Supreme Court construing the national authority to regulate interstate commerce as extending not merely to commerce in the older and narrower sense, but also to manufacturing and mining, have opened the way for still fuller exercise of what may be termed a federal police power.² Even this last-mentioned development, however, relates only to specified operations connected with commerce, and the great bulk of regulative authority associated with the police power in general still rests exclusively with the states. The proposal in some quarters is that, by constitutional amendment, this broad and basic power be transferred to the national government, to be exercised at least concurrently with the states. In *McCulloch v. Maryland*, John Marshall asserted that "no political dreamer was ever wild enough to think of breaking down the lines which separate the states, and of compounding the American people into one common mass." By largely depriving the states of their principal reason for existence, the action proposed would, nevertheless, be a long step in that direction; and even though it is reasonable to anticipate some continued growth of federal police power, no step of the kind is likely to be taken in the foreseeable future. States that have balked at even a child labor amendment would certainly not be prepared for the great surrender involved.

The upshot would seem to be that, however much farther their position may be undermined in certain directions by constitutional amendment and interpretation, and by legislation and practice in such matters as federal aid, the states will persist, not merely as geographical and political entities, but as custodians of the greater part of their present powers and functions, together with new ones springing from ever-continuing development of technology, ideas, and economic life. Hardly anything short of sheer dictatorship would enable the political map of this country to be remade as that of Germany was remade by ruthless Nazi officials after 1933. Not only so, but, even after their harrowing experiences of the depression decade, the states have grounds for facing the future with assurance. Their fundamental position in the constitutional system is secure as long as they do not themselves choose to relinquish it; the United States, reaffirmed the Supreme Court in 1936,³ employing the historic language of Chief Justice Chase, is still "an indestructible union of indestructible states." As observed above, the states nowadays carry on more activities, spend more money, have more employees, and do more for their people than at any time in the past.

The
states
not yet
"fin-
ished"

¹ See p. 333 below.

² See pp. 532-533 below.

³ In *United States v. Butler* (297 U. S. 1), invalidating the Agricultural Adjustment Act of 1933.

Even if they could be abolished, something—as all regionalists agree—would have to be put in their places. As semi-autonomous political entities regulating the relations of their citizens by laws of their own devising, they unquestionably have lost some ground; in larger matters of social and economic control, they probably will continue to lose. As areas of administration, however, they have gained; and even though, as seems likely, they in the future may function more and more, in their administrative work, as collaborators with, and even as agents of, the national government, they need not on that account suffer total loss of vitality—even if there were not always going to be plenty of things for them to decide upon and undertake independently.

Some
ways of
strengthen-
ing
their
position:

1. Over-
hauling
their own
govern-
ments

There are ways, too, in which they can definitely improve their present position. One of these is intelligent and fearless overhauling of their governmental machinery and procedures. Prestige and power have been lost in later decades because (to no small extent) of failure of the states to deal effectively with difficult problems thrust upon them by the exigencies of the times. To be sure, a good deal of what has happened has flowed from circumstances beyond the states' control. By setting their houses in order, however—regenerating their legislatures, toning up their civil services, improving their administrative methods, modernizing their county and other rural local governments, and utilizing the newer techniques of long-term planning—they may still, to a considerable degree, stem the tide that has been running against them. The best way to preserve state power is to improve state competence.

2. Re-
moving
interstate
barriers
and
curbing
interstate
rivalries

A second promising line of action is the breaking down of certain barriers arising not unnaturally from the legal separateness of the states, yet interfering with their own best interests as well as with the free life of a united nation. Most serious of these barriers were, in years before the war, those erected against the movement of goods and services across state lines. To be sure, the federal constitution, correcting a grievous deficiency of the Articles of Confederation, forbids the states to levy tariff duties on imports or exports or to discriminate against the commerce, shipping, or citizens of other states. In the depression era, however, states, and even localities, were in many cases persuaded to come to the aid of their own hard-pressed producers by setting up obstacles to the admission of competing products from outside sources; and a great variety of ingenious devices resulted, ranging all the way from mere organized campaigns to promote the buying of local products to (1) laws giving preference to such products in all state purchases, (2) laws forbidding the sale of electric power beyond state lines, (3) quarantine and inspection laws grounded ostensibly on the police power of protecting health, morals, and safety, but really designed to set up discriminations against goods produced outside of the state, (4) measures creating "ports of entry" to administer restrictions calculated to discourage interstate trucking, and, above all, (5) employment of the taxing power (a)

to discriminate against corporations chartered in other states, "foreign" insurance companies, nation-wide chain-store systems, and persons undertaking to evade sales taxes by buying outside of the state, and (b) to protect "domestic," as opposed to out-of-state, products, as, for example, in the case of states imposing tax burdens (in the interest of local butter producers) on margarine, or (in the interest of local cotton growers) on "foreign" ingredients used in place of cottonseed oil in manufacturing that commodity.

For a good many years, however, there has been growing realization that the supposed advantages accruing from interstate trade barriers are illusory. Individuals profit, of course; but for every one who gains, many lose. The cost of intrastate products to the consumer is increased; other states are driven to retaliatory measures which cut off extrastate markets; ill-will and recrimination are engendered all around. Although behaving often like competitive nations, the states are all bound up in one nation-wide economy, and in the long run can prosper, not alone and individually, but only jointly and collectively. The courts having ruled out only "direct" burdens on interstate commerce, as distinguished from the multifold "indirect" burdens interposed by the states, some people have advocated amending the federal constitution to give Congress power to intervene with uniform national laws in all the different fields in which the states have been prone to legislate discriminatively. A better, although slower, solution would, however, seem to lie in consultative, coöperative federal-state action leading to gradual acceptance of the long-run advantages of non-discriminatory policies. And it is gratifying to observe that, largely as a result of a persistent publicity and educational campaign launched by the Council of State Governments¹ and its affiliated organizations in 1939, there was, even before the war, a decided slackening in trade-barrier legislation, accompanied by fairly rapid repeal of existing discriminative laws. Wartime need for the fullest mobility of shipping and trade accelerated the trend (one will recall the nation-wide abandonment, at least for the duration, of burdensome restrictions upon truck transportation); and we may anticipate a greatly improved situation in the future—unless perchance another era of economic depression should unfortunately lead to a revival of the discriminative practices of the thirties.²

Coöperation need not, however, be confined to the removal of barriers and the curbing of rivalries. By enacting uniform legislation on business practices and other appropriate subjects, states may not only raise the

3. Coöperation in still other ways

¹ See p. 114.

² The best thumb-nail discussion of the trade-barrier problem as it stood a few years ago is F. E. Melder, "State Trade Walls," *Public Affairs Pamphlets No. 37* (New York, 1939), with references for further reading. Several states discriminate with respect to services as well as goods, requiring, for example, that only legal residents shall be on their payrolls. There are also, of course, various forms of state competition not necessarily involving discriminative practices; for example, bidding by advertising for the profits arising from the tourist trade.

general level but counteract arguments for national, or perchance regional, regulative action. By reciprocally extending rights and privileges to one another's citizens, as, for example, in the practice of the professions, they may obviate jealousies and promote the general well-being; in the domain of taxation, in particular, they may serve the ends of justice by mutually refraining from imposing double or triple burdens.¹ Information may be exchanged, common problems discussed in conferences, joint investigations carried on, voluntary interstate organizations maintained for a wide variety of purposes. Many new instrumentalities have come into existence to facilitate coöperation on such lines. A Council of State Governments, dating from 1933, links the governments of almost all of the states in a voluntary league for the promotion of coöperative action; the 7,500 members of state legislatures have been brought together in a professional American Legislators' Association; different types of state and local executive and administrative officials—governors, auditors, comptrollers and treasurers, chiefs of police, city managers, housing officials, etc.—have formed similar nation-wide organizations;² interstate commissions on social security, crime, and conflicting taxation have been set up; and a strong consciousness of common interests and reciprocal obligations has been developed among state legislative and administrative groups the country over. All told—through these kinds of activities and in other ways—the chances for friendly and intelligent solution of problems transcending state lines have been considerably improved; and in so far as matters that otherwise the national government would be tempted or compelled to deal with are taken care of through such channels of interstate comity and coöperation, the outlook for the states themselves will have been brightened.

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¹ A familiar form taken by this sort of comity is the recognition all around of one another's motor vehicle licenses. Another arrangement that has grown very common since national defense became one of our major concerns is permission for officers or contingents of State Guards (organized in most states after mobilization of the National Guard in federal service in 1940) to cross boundaries in pursuit of saboteurs, insurrectionists, or other persons obstructing the country's defense activities.

² All of these, and other, organizations have headquarters in a building located at 1313 East 60th St., Chicago, with branch offices in Washington, D. C. See *The Book of the States, 1943-1944* (Chicago, 1943), 1-50.

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3. CITIZENSHIP AND CIVIL RIGHTS

CHAPTER VIII

THE PEOPLE OF THE UNITED STATES—CITIZENS AND ALIENS

Declining
rate of
popula-
tion
growth

The sixteenth census, taken as of April 1, 1940, showed the population of the continental United States to be 131,409,881. That is a large number of people; among the countries of the world, only China, India, and the U. S. S. R. contain more. The average density per square mile at the date mentioned was, however, only 44.2; and notwithstanding the comparative sparseness that this figure suggests, the rate of population increase has for upwards of a generation been slowing down, being only about seven per cent in 1930-40, as compared with 16.1 per cent in the preceding decade and as high as 21 per cent in 1900-10. The explanation of this trend is in part the decrease of immigration, under our quota system, to a mere trickle.¹ To a far greater extent, however, it is to be found in a steady decline of the birth-rate, observable from as far back as 1924. Nor is this latter phenomenon expected to be only temporary. On the contrary, students of population problems, peering into the future, see it continuing until, around 1985, a point of equilibrium will be reached, with the figure at something like 161,000,000—after which there may set in an actual decline. Throughout our history, national prosperity has always been predicated on rapidly expanding population, as well as fast-growing industry and markets. The day is coming—if indeed it has not already dawned—when the nation's business can no longer count upon that favoring factor.

The population situation has, of course, been affected sharply by the war. Economic prosperity, induced by defense activity, and marriages hastened by the prospect of conscription and of entrance into war, largely explain a decided rise in the birth-rate in 1940-41, with the result that the total population at the end of 1942 was estimated by the Bureau of the Census at 133,950,000. Later on, the birth-rate fell below normal; and meanwhile immigration virtually ceased, the death-rate began to reflect wartime hazards, and actual resident population fell off by several million on account of movement out of the country of armed forces bound for overseas service.

Changing
distribu-
tion:
rural
and
urban
elements

Not only was the country's population before the war growing more slowly than ever before, but significant changes were taking place in its distribution and character. During a generation and a half marked by great industrial expansion, the population of towns and cities had in-

¹ See p. 120 below.

creased far faster than had that of rural areas—at an average rate, indeed, of 33 per cent in the period 1890-1930, as compared with a rural rate of 7.2 per cent; and as a result, the proportion of the people living in towns and cities of over 2,500 rose from 35.4 per cent at the earlier date to over 56 per cent at the later one. During the decade 1930-40, however, the shift of population from farm to city levelled off sharply, urban increase being at the surprisingly low rate of less than eight per cent, as compared with a rural increase of somewhat over six per cent. In other words, American cities had of late, for the first time in a century, been growing at a pace scarcely faster than rural areas, or than the country as a whole. Many cities, indeed (including twenty-six important ones in the industrial Northeast alone) actually contained fewer people in 1940 than in 1930. Diminished immigration and a declining birth-rate, of course, afford explanation in part. But lessened opportunities for work and wages during the depression years, together with a tendency toward the decentralization of industry, were influential—as was also the movement of people everywhere from older crowded urban areas into newer and more attractive suburbs, made possible by the automobile and improved highways.

Since 1940, the picture has naturally been changed by the defense effort and war. Not only have literally hundreds of smaller places become "boom towns" thronging with workers in munitions plants and other war industries (many such boom towns, indeed, sprang up where none had been before), but middle-sized and larger cities have received influxes swelling their populations (mainly in 1940-42) by anywhere from twenty to fifty per cent.¹ While this was going on, however, other cities declined; and although it is far too early to forecast the ultimate and lasting consequences of so vast a dislocation of population, it is fair to assume that the long-term slowing up of urban growth will prove to have been reversed only temporarily—particularly if the war should in time be followed by depression conditions leading workless people to turn once more to the countryside (where, however, limits are enforced by the mechanization and otherwise increased efficiency of agriculture, enabling one-fifth as many workers to produce a given volume of food-stuffs and materials as seventy-five years ago).

The over-all declining growth of urban population is, of course, not without its significance for city planning, for education, and for party procedures, elections, representation in Congress and in state legislatures, and other political processes; in particular, the movement of people out into suburban districts has created tax difficulties for many municipali-

Signifi-
cance for
govern-
ment

¹ See W. F. Ogburn, "Whither Population?," *State Government*, XVI, 27-28, 38-41 (Feb., 1943). It may be mentioned, too, that between July 1, 1940, and July 1, 1942, there was a shift of two and one-half million civilian war-workers, together with men in military training, and also women auxiliaries, to the Southern and Western portions of the country, while the North-Central and Northeastern sections were suffering a net loss of half a million.

ties.¹ More than half of the people of the country, however, are still to be found in urban areas; and this remains a cardinal factor in our political life. Municipal government has gained enormously in importance; a new type of population grouping—the metropolitan community, best seen in the New York, Boston, Chicago, and Detroit areas, but seen wherever a constellation of towns is clustered around a dominating metropolitan center—has risen to complicate governmental relationships; new and baffling problems of rural local government have been created, not only by the transition from an ox-cart to a motor age, but by the depletion and impoverishment of great stretches of the countryside, and by the frequently defective distribution of population in relation to economic resources. Even the question of how, and to what extent, government may intervene to bring about a sounder population distribution has come into the picture.²

Race and
nativity

Then there are the matters of racial texture and ratio of native elements to foreign-born. Viewed racially, our population in 1940 was 89.8 per cent white, 9.8 per cent Negro, 0.3 per cent Indian, 0.1 per cent Chinese, and 0.1 per cent Japanese, with quite a number of other very small groups. Taking the heavily dominant white element alone, 63.7 out of every hundred were native-born of native parentage; 17.5 were native-born of foreign or mixed parentage; and 8.6 were foreign-born.³ Analysis of the many complicated data involved goes to show that the country is steadily becoming more "American," in the sense that native-born whites of native parentage—now outnumbering all other persons by nearly three to two and all other whites by two to one—have for some time been increasing at a considerably faster rate than the total population.⁴ Here again is a fact of political as well as social significance, giving promise of a more homogeneous population than that which fifty years ago created problems of serious import in the government particularly of cities. In 1940, the largest group among the foreign-born was Italian, with Germans second, peoples from Russia (mainly Jews) third, and Poles fourth.

¹P. M. Hauser, "How Declining Urban Growth Affects City Activities," *Pub. Management*, XXII, 355-358 (Dec., 1940). Cf. M. Jefferson, "The Great Cities of the United States," *Geog. Rev.*, XXXI, 479-487 (July, 1941).

²Under the auspices of the federal Resettlement Administration and the Farm Security Administration which succeeded it in 1937, many thousands of people have indeed been moved from inhospitable to better favored areas. See p. 581 below. Appointment of a committee on urbanism by the then existing National Resources Committee some years ago bore fruit in an interesting report, *Our Cities; Their Role in the National Economy* (Washington, 1937). Cf. S. A. Queen and L. F. Thomas, *The City; A Study of Urbanism in the United States* (New York, 1939).

³For the figures, see *Statistical Abstract of the United States, 1942* (Washington, 1943), 19.

⁴*Recent Social Trends in the United States* (one-vol. ed., New York, 1933), 19.

The Regulation of Immigration

Historically, the United States is, of course, an immigrant country; all of our people except the Indians have come from foreign lands or are descended from those who did so at some time after the beginnings of European settlement on our soil. In the eighteenth and nineteenth centuries, our fast-growing population was fed steadily by immigrant streams flowing in earlier days principally from Great Britain, Ireland, Germany, and Scandinavia (Negroes, too, from Africa), but later also from Italy and Slavic Europe. From 1789 onwards, there was no lack of power to check the inflow to any extent desired. In 1848, the federal Supreme Court held that jurisdiction over the matter belonged exclusively to the national government;¹ in a series of cases ending in 1883, it declared such jurisdiction incidental to the power of Congress to regulate foreign commerce; and in 1889 it further based it upon the right of any sovereign nation to control its own foreign relations.² For a long time, however, our policy was to encourage, and even to stimulate, the coming of home-seekers, laborers, and refugees. Only when the influx from southern and central Europe grew startlingly large and sentiment against the admission of Chinese laborers reached a high pitch on the Pacific coast did we definitely embark upon a different course. In 1882, the first Chinese Exclusion Act was passed; in the same year, paupers, insane persons, and other undesirables were excluded; three years later, laborers under contract to individuals or corporations were debarred; and thereafter one group after another was added to the ineligible list, until by 1917 no fewer than thirty different grounds for exclusion had been enumerated. In the year mentioned, still another was added, when Congress enacted that thenceforth no migrants over sixteen years of age should be admitted who could not read English or some other language or dialect.³

Earlier policies

Despite impediments thus imposed, the inflowing tide of foreigners reached the high level of 1,200,000 in 1913;⁴ and when, following a sharp recession during the ensuing war, indications of a new flood appeared, Congress (in 1921) abandoned mere personal defects as the primary ground for restriction and as a substitute adopted a "quota" system under which even the fully qualified were to be admitted from various

Adoption of the quota system

¹ Passenger Cases, 7 Howard 283 (1848).

² Chinese Exclusion Cases, 130 U. S. 581 (1889). Cf. *Fong Yue Ting v. United States*, 149 U. S. 698 (1893).

³ *Code of the Laws of the U. S.* (1934), 185-212. By and large, the influence operating most powerfully in favor of immigration restriction has been organized labor, its object being, of course, to prevent the impairment of wage-levels and of the working-man's standard of living through the influx of workers willing to accept meager wages and accustomed to "un-American" living conditions. It is not without significance that the administration of the immigration laws was from 1913 to 1940 vested in the Department of Labor. Transfer of it at the latter date to the Department of Justice evidenced a shift of emphasis—at a time of anxiety about subversive activities—from the labor aspect to regulation in the interest of national unity and security.

⁴ Our heaviest immigration in any single year was 1,285,349 in 1907.

countries only up to a number per year allotted to the respective countries in accordance with a statistical schedule of "national origins." Following a period of experimentation, the law nowadays in effect—the National Origins Act—became operative on July 1, 1929; and our new policy of not only limiting the quantity of immigration, but selecting it qualitatively in terms of national stocks, has apparently become a fixture.

Our present immigration system and its workings

Under the national origins plan as operating until virtually suspended by our entrance into the war,¹ the salient features of our immigration policy were as follows: (1) as being ineligible for naturalization, nearly all Asiatics were debarred,² (2) immigrants from American countries were admitted without restriction except as the laws excluded general categories such as anarchists, criminals, and paupers; (3) immigrants from European countries were admitted (subject, of course, to the same general rules of eligibility) on a national origins basis, designed both to limit numbers and to select stocks. "National origins" admissions were restricted to a fixed maximum per year, *i.e.*, 153,774, and were allotted to various countries (not races) in the proportion in which the different nationalities contributed to the white population of the United States as it stood at the census of 1920, except that no quota might be smaller than 100. Almost eighty-five per cent of the whites in the United States in 1920 represented strains originating in northwestern Europe. Hence the largest quotas went to Great Britain and Northern Ireland (65,721), Germany (27,370), and the former Irish Free State—present Eire (17,853). Far below came Poland (annihilated in 1939 by conquest) with 6,524, Italy with 5,802, and other countries each with 3,300 or less.³

This national origins system was hardly in operation before the country was overtaken by the economic depression starting in 1929, and the two things conjointly cut immigration to the smallest dimensions in many decades; years followed in which the number of aliens entering the country for permanent residence was actually smaller than that of those departing, voluntarily or by deportation. The outbreak of European war in 1939 temporarily stimulated some flight to America, and in the fiscal year ending June 30, 1940, a total of 51,997 alien immigrants from quota countries were admitted. In the following year, however, the number dropped to 36,220; and with the entrance of the United States into the war, in December, 1941, all immigration from enemy countries (chiefly Germany and Italy) came to an abrupt stop, and that from other European lands fell to negligible proportions.

The shattering effects of a global war, and the resulting uncertainties about the economic well-being of the United States in the postwar years,

¹ The pertinent statutes will be found in *Code of the Laws of the U. S.* (1934), 180-212.

² Travellers, students, business men, and various professional people might be admitted for limited periods.

³ The McDuffie-Tydings Act of 1934 (see p. 704 below) restricted Filipino immigrants to fifty a year; this, of course, was a "quota," but independent of the "quota system" maintained under general law for European immigration.

may be counted upon to force new and weighty decisions concerning our immigration policy. Huge numbers of Europeans who have lost everything will want to make a fresh start in America; and our country will have to decide whether to let down the bars, to adhere to the restrictive system of the later prewar years, or indeed, as some have proposed, substantially to ban all immigration whatsoever for a protracted period. At the very least, a changed political geography of Europe will make necessary a reconsideration of existing quota arrangements; and in undertaking this there will have to be decisions not only upon how much to alter the quotas for peoples previously covered, but also whether to raise or lower the over-all quota limits and whether to impose such limits upon peoples not hitherto affected. There will have to be decision, too, upon whether to continue or modify the former policy of debarring all Japanese. One may hazard the guess that concern about employment conditions will, at least for a good while, prevent aliens from being admitted any more freely than in prewar years.¹

New situation resulting from the war

Originally left mainly to state authorities, enforcement of the immigration laws has since 1891 been in charge of a staff of federal commissioners of immigration, stationed at the various ports of entry and assisted by inspectors, interpreters, and other subordinates, with supervision centralized in an Immigration and Naturalization Service, in the Department of Justice, headed by a commissioner. Until two decades ago, little effort was made to sift prospective immigrants before departure from their old homes; those desiring admission to the country simply presented themselves at our ports, where they were examined and accepted or rejected. The number of rejections was large, with many resulting hardships. Beginning in 1924, we wisely shifted most of the work of inspection to foreign centers from which immigrants come. Experienced officers assigned to American consulates in the capacity of technical advisers on immigration interview prospective migrants, counsel them, and determine whether they would probably be admitted; indeed, since 1927 those who would enter the country have been required to provide themselves with an American consular "visa" before they embark. How effective the reform has been is indicated by the fact that in the later prewar years not more than from five to seven per cent of those seeking entrance at our ports were turned back. Immigration officials stationed on our own soil have for a good while been occupied more largely with deportations than with admissions, except in the case of an immigration border patrol of some three thousand men, mounted and otherwise, which is charged with preventing the smuggling of aliens into the country from

Administration of the immigration laws

¹ One morally, although not numerically, significant change already made is the placing of China in 1943 on a quota basis, in recognition of our wartime alliance, as well as traditional friendship, with that country. The number of Chinese admissible per year under the new law is only 105. For a brief history of Chinese exclusion, see C. Gordon, "Our War of Exclusion Against China," *Lawyers Guild Rev.*, III, 7-19 (May-June, 1943).

Canada, Mexico, and near-by islands. Aliens who consider that they have been unjustly denied admission to the country are entitled to apply in a federal court for a writ of *habeas corpus* with a view to having their rights administratively determined.¹

Aliens—Rights and Restrictions in Peace and War

Peace-time status of aliens

Speaking broadly, every resident of the United States is either a citizen thereof or an alien—if an alien, presumably a citizen of some other country merely living, temporarily or permanently, among us. In many respects, it does not particularly matter—under ordinary, peace-time conditions—which a person is. He must obey the laws and pay his taxes in any case; even though an alien, he is entitled to “the equal protection of the laws,” and may sue and be sued in the courts, enter into contracts, and send his children to the public schools; and unless he happens to belong to a racial group that has been made ineligible, he may be naturalized, thereby acquiring full citizenship status. There are, however, limitations. An alien cannot vote or hold public office;² seldom can he act as a juror; his right to own property is almost as broad as a citizen’s, but not quite, because California, Illinois, and a few other states impose varying restrictions; and while, in general, he can engage in any gainful occupation or profession that does not require a license, increasing numbers of businesses and professions have been put under license requirements, and in virtually every state there are laws debarring aliens from receiving certain kinds of licenses.³ The alien, further, may be excluded from employment on public works and in munitions plants, and increasingly he is prevented—rather unjustly—from sharing in relief benefits, such as workmen’s compensation and old-age pensions;⁴ and of course if he goes abroad, he cannot claim protection from our government as can a citizen.⁵

¹ L. F. Post, “Administrative Decisions in Connection with Immigration,” *Amer. Polit. Sci. Rev.*, X, 251-261 (May, 1916); W. C. Van Vleck, *The Administrative Control of Aliens* (New York, 1932); Secretary of Labor’s Committee on Administrative Procedure, *The Immigration and Naturalization Service* (Mimeo., Washington, 1940).

² In as many as twenty-two states and territories, aliens who had declared their intention to be naturalized have, at one time or another, been allowed to vote. Constitutional amendments gradually withdrew this privilege, however, and a state supreme court decision of 1926 terminated it in the last state (Arkansas) in which it survived.

³ For example, to practice law or medicine or dentistry. Such discriminative laws must run the gantlet of the courts on the ground of reasonableness, but even in the legal and medical professions the alien has been largely shut out.

⁴ Sometimes, however, a state goes too far in enacting such legislation. Thus when Arizona undertook to require that any individual or corporation employing more than five workers at one time should employ not less than eighty per cent qualified electors or native-born citizens of the United States, the federal Supreme Court held that such a requirement was unconstitutional as involving a denial of the equal protection of the laws. *Truax v. Raich*, 239 U. S. 33, 41 (1915). See B. O’Connor, “Constitutional Protection of the Alien’s Right to Work,” *New York Univ. Law Quar. Rev.*, XVIII, 483-497 (May, 1941).

⁵ On the general subject, see E. W. Puttkammer [ed.], *War and the Law* (Chicago, 1944), 38-47; W. M. Gibson, *Aliens and the Law; Some Legal Aspects of the National Treatment of Aliens in the United States* (Chapel Hill, N. C., 1940); and N. Alexander, *The Rights of Aliens Under the Federal Constitution* (Montpelier, Vt., 1931).

Indeed, even here at home, an alien may fail to receive protection of person and property to which, legally, he is as much entitled as is a citizen. At various times, "foreigners" have been the victims of mob violence;¹ and as matters stand, with the states primarily responsible for maintaining law and order, such injured persons, or their relatives, have recourse only to state authorities (including grand juries and courts), which are likely to be influenced by local sentiment to extend them no relief. At least four presidents have asked Congress to give the federal courts jurisdiction in such cases, but to no avail, and meanwhile the national government continues in the uncomfortable and undignified position of being responsible under international law for protecting aliens, but unable under our system of constitutional law either to punish the perpetrators of outrages or to compel the states to assume the burden of damages. What usually happens is that after the federal government, pressed by the envoy of the foreign nation concerned, tries but fails to induce the state authorities to act, Congress, on request of the president, votes a sum of money to be awarded *ex gratia*, and the affair ends.

Inade-
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tion
against
mob
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As the reasons for which aliens might be excluded multiplied in later decades, the grounds on which (and the period after entry within which) they might be deported also increased. Until a quarter of a century ago, deportees were usually mental or physical defectives, criminals or immoral persons, persons who had become public charges, or persons who had entered the country illegally. Fear of radical influences led Congress in 1918 to authorize the expulsion of alien revolutionists, anarchists, and advocates of sabotage, assassination, and other forms of violence; and under this authority the Department of Justice in 1919-20 conducted a sensational drive against "Reds" and suspected "Reds," whose wholesale deportation, chiefly to Russia, aroused considerable protest from people who deplored what they considered an unfortunate surrender to popular hysteria.² As the law now stands, an alien, even though not at the moment a member of any subversive organization, is deportable if it can be shown that he was such a member at the time of his admission to the country or at any subsequent time. To be sure, the Supreme Court, in 1939, held aliens not deportable merely because of having once been a member of the Communist party.³ But the Alien Registration Act of 1940 (explained below) provides to the contrary. Since the quota acts tightened up admission to the country, deportations have been chiefly in pursuance of the legislation of 1918 and its amendments; and for some years the number of deportees (deported under warrants or allowed to depart at their own expense and without warrants) varied between 15,000 and 20,000 a year. No sooner was the 1940 registration of aliens

Depor-
tation

¹ Perhaps the most serious incident of this nature was the lynching of eleven Italians at New Orleans on March 14, 1891.

² L. F. Post, *The Deportations Delirium of 1920* (Chicago, 1923); Z. Chafee, *Free Speech in the United States*, Chap. v.

³ Kessler, *District Director of Immigration, v. Strecker*, 307 U. S. 22 (1939).

completed than the Department of Justice started a systematic combing of the returns with a view to ferreting out cases of illegal entry, criminality, falsifying information, membership in subversive organizations, and other deportable offenses—even though, with sailings to Europe practically restricted to Great Britain by wartime conditions, it already had on its hands thousands of objectionables who could not be got rid of because of the impossibility of gaining entry for them into any foreign country.¹ Communist, Fascist, and Nazi activities aimed at undermining the government and security of the United States became in the later prewar years a major ground for at least potential deportation.²

The new
system
of alien
registra-
tion

In times past, no one knew how many aliens there were in the country or where they were located except as disclosed every ten years by the census. Growing tenseness of the international situation in the later thirties, combined with the increasingly difficult task of curbing subversive activities and influences, and climaxed by the outbreak of a major war in Europe in 1939, led in 1940 to a decision to require every alien over fourteen years of age to register and be finger-printed within a stipulated period, and thereafter to keep the proper federal authorities informed of his address and occupation.³ Most European states have long required the same thing, registration there commonly being with the police, whereas here it has been taken care of at post-offices and in some instances school-houses. Over the initial designated period of four months, a total of 4,741,971 registered, amounting to about three and one-half per cent of our total population. Every assurance was given registrants that the information concerning their past obtained through the searching questions put to them would be regarded as confidential, and no effort was spared to relieve the procedure of any possible stigma.⁴

Effects of
the war
on the
status of
aliens:

When war comes, aliens immediately fall into two basic categories—those of neutral or friendly nationality and those of enemy nationality, or in other words “alien enemies.” The war in which we became involved in 1941 had no very important effects upon the legal position of aliens in the former category. If they wished to leave the country, they must

¹ The number of deportations fell to 10,938 in 1941.

² Earlier treatises on the general subject include “Report on the Enforcement of the Deportation Laws of the United States,” *Report of the National Commission on Law Observance and Enforcement*, No. 5 (May 27, 1931), and J. P. Clark, *The Deportation of Aliens from the United States to Europe* (New York, 1931). An alarmist discussion of the menace (to a degree, a genuine one) arising from the presence of unfriendly foreign agents in the country will be found in M. Dies (former chairman of the House of Representatives Committee for the Investigation of Un-American Activities), *The Trojan Horse in America* (New York, 1940), and a less sensational one in H. Lavine, *Fifth Column in America* (New York, 1940). The most notable deportation proceedings of recent years have had to do with an Australian C.I.O. leader active in fomenting maritime strikes on the West Coast, Harry Bridges. For the earlier stages of his long-drawn-out case (he has never actually been deported), see J. M. Landis, *In the Matter of Harry Bridges* (Washington, 1939); 78th Cong., 1st Sess., House Doc., No. 92 (1943), “Facts in Cases of Certain Alien Deportations.”

³ 54 U. S. Stat. at Large, 670. All newly arriving aliens were required to register also.

⁴ On the Alien Registration Act of 1940, see Z. Chafee, *Free Speech in the United States*, Chap. xii.

secure a permit prior to departure; those having assets of over one thousand dollars were required to report them to the Treasury Department; and liability to military service was incurred, although this also had been true to a limited extent in World War I.¹ Many, however, suffered from discriminatory treatment at the hands of misguided industrial establishments which discharged or refused to employ non-citizens.

1. Of
friendly
national-
ity

The case of alien enemies² was, of course, different. Obviously, one of the first things to be done was to obtain means of identifying them; and under a proclamation of the President, issued January 14, 1942—five weeks after we entered the war—all alien enemies over fourteen years of age were required to register again at their local post-offices, to be fingerprinted, to deposit three photographs of themselves, and to receive certificates of identification (to be carried at all times) in the form of booklets resembling passports. The number revealed was approximately a million—Germans, Italians, and Japanese; although, as of the following October 19, some 600,000 Italians, because of their generally recognized loyalty to the United States, were removed *en masse* from the classification. Drawing most of the necessary authority from an Alien Enemy Act dating from as far back as 1798 and authorizing alien enemies to be “apprehended, restrained, secured, or removed,” the government pursued a course of action embracing the following main features: (1) negotiation (through neutral intermediaries) with the enemy governments for reciprocal humane treatment of civilians in enemy territory;³ (2) imposition of various restrictions, such as forbidding alien enemies (a) to enter “restricted” or “prohibited” areas (*e.g.*, prescribed zones around army camps, navy yards, and munitions plants), or, indeed, to travel at all more than very limited distances without permission, (b) to change their jobs without giving advance notice, or (c) to have in their possession firearms, short-wave radios, cameras, military maps, or other designated articles; (3) arrest of alien enemies with dubious records or for other reason subject to suspicion, with hearing boards set up in all of the eighty-six federal judicial districts to recommend to the attorney-general whether a given alien should be released unconditionally, paroled, or interned for the duration of the war, and with the official mentioned making the final decision;⁴ (4) removal, on presidential authority and under military auspices, of 110,000 Japanese—citizens as well as aliens—from military zones adjacent to

2. Of
enemy
national-
ity

¹ W. W. Fitzhugh and C. C. Hyde, “The Drafting of Neutral Aliens by the United States,” *Amer. Jour. of Internat. Law*, XXXVI, 369-382 (July, 1942).

² With a view to discouraging a repetition of the anti-alien hysteria of 1917-18, the government has sought to soften the opprobrium attaching to “alien enemy” by using only the designation “of enemy nationality.” The shorter and more usual term may, however, be employed here.

³ As the war progressed, evidence mounted that, in the case of Japan at all events, the pledges secured were not fully lived up to.

⁴ The first year of the war saw only 12,071 persons taken into custody; and of the number, more than one-fourth were released. Experience showed plainly the fallacy of assuming that any national of an enemy state was *per se* loyal to the enemy.

the Pacific coast, followed by resettlement of them, under direction of a civilian War Relocation Authority, in ten interior "relocation areas," from which those found loyal to the United States were permitted to go to other parts of the country in quest of homes and employment; and (5) "freezing" of enemy funds and investments in the United States, followed by general sequestration (not confiscation) of billions of dollars worth of enemy-owned private property—banks, stores, warehouses, and what not—which from then on, for the duration, was in the care of an Alien Property Custodian. Some of the policies adopted raised debatable issues—perhaps most of all, that relating to the Japanese evacuation. Considering, however, the numbers of alien enemies involved, all told, and the unfortunate effects that could follow from mishandling it, the problem may be said, on the whole, to have been dealt with intelligently and successfully.¹

Citizenship and How It Is Acquired

Citizen-
ship as
defined
in the
constitu-
tion—its
dual
aspect

Curiously, there was long a great deal of doubt as to precisely who were entitled to be regarded as citizens, and of what jurisdictions. In its original form, the constitution used the term no fewer than seven times, but without ever once defining it.² In some clauses, it spoke of citizens of states, and in others of citizens of the United States, and nowhere were the relations between the two made clear. Even yet, there is often confusion on the point. In the Fourteenth Amendment, however, we read that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside"; and while this leaves the way open for a state citizenship as something distinct from national citizenship, it at least indicates who are to be regarded as possessing either or both. In general, the two go together: any citizen of the United States living within the boundaries of a state is a citizen of that state. Legally, there is nothing to prevent a state from conferring its own citizenship (not, of course, *national* citizenship) on persons who are not citizens of the United States; and in times past this has been done. Furthermore, citizens of the United States residing permanently in the District of Columbia or in a territory are not citizens of any state. For practical purposes, however, the two citizenships have been almost completely merged; and in

¹ L. V. Howard and H. A. Bone, *Current American Government*, Chap. VIII; D. O. Walter, *American Government at War*, Chap. v; R. R. Wilson, "The Treatment of Civilian Alien Enemies," *Amer. Jour. of Internat. Law*, XXXVII, 30-45 (Jan., 1943). A good brief account of the evacuation of the Japanese will be found in E. W. Puttkammer [ed.], *War and the Law*, 58-70, and a full discussion in C. McWilliams, *Prejudice; Japanese-Americans: Symbol of Racial Intolerance* (Boston, 1944), Chaps. iv-v. The latter author considers the Japanese evacuation understandable (with the West Coast early thought of as a possible theater of war), but nevertheless unnecessary.

² The Supreme Court's definition is as follows: "Citizenship is membership in a political society and implies a duty of allegiance on the part of the member and a duty of protection on the part of the society. These are reciprocal obligations, one being a compensation for the other." *Luria v. United States*, 231 U. S. 9 (1913).

any event, it is only national citizenship that has significance under the national constitution and laws, and also in international relations.¹

Citizenship is acquired in various ways in different countries; but the most important are birth and naturalization. Citizenship by birth arises from the operation of one or the other of two quite different principles. Under the first—known as *jus sanguinis*—a child takes the nationality of its parents, regardless of the place of its birth; under the second—called *jus soli*—nationality is determined by the place of birth, irrespective of the citizenship of the parents. The historical and fundamental rule of the United States, in common with other English-speaking, and also the Latin American, countries, is *jus soli*;² and the rule is construed to be applicable even to children born on American soil to alien parents who are themselves ineligible for citizenship.³ The phrase of the Fourteenth Amendment requiring that a person be not only born or naturalized in the United States, but "subject to the jurisdiction thereof," gives rise, however, to some rather important exceptions. Thus, children born to foreign diplomatic representatives stationed at Washington are not citizens, because even though born on American soil, they are considered to be subject to the jurisdiction of the state which the ambassador or minister represents, and not to the jurisdiction of the United States.⁴ On the other hand, persons born abroad *before* May 24, 1934, are citizens if the father had American citizenship and resided in the United States or its outlying possessions at some time before the child's birth; and

How
citizen-
ship may
be ac-
quired.

1. By
birth

¹ L. Gettys, *The Law of Citizenship in the United States* (Chicago, 1934), 3-8. Speaking strictly, citizens are individuals only. Corporations, however, are "persons" within the meaning of various clauses of the constitution, and are regarded judicially as citizens of the states in which they are chartered. They are at best, however, only quasi-citizens, being not entitled to all the "privileges and immunities" which the constitution guarantees to the individual citizen. See C. H. Maxson, *Citizenship*, Chaps. XI-XII. One encounters also the term "nationals," which is not to be confused with "citizens." In a general way, it denotes all persons who, for purposes of international intercourse, are identified with a given nation. It is therefore broader than "citizen"; for example, the people of the Philippine Islands have been nationals of the United States, but never citizens thereof. Cf. C. H. Maxson, *op. cit.*, Chap. XIII.

² As applying to the United States, the statement must be qualified by saying that, as indicated below, in connection with *our own* nationals abroad, and children born to them, our government has leaned strongly toward *jus sanguinis*.

³ *United States v. Wong Kim Ark*, 169 U. S. 649 (1898). In *Perkins et al. v. Elg and Elg v. Perkins et al.*, 307 U. S. 325 (1939), the Supreme Court held (contrary to what previously would have been supposed) that a woman born in the United States did not lose her American citizenship merely because when she was four years old her parents returned to their native Sweden and renewed their allegiance there. For purposes of citizenship, the "soil" of the United States includes the continental area, Alaska, the Hawaiian Islands, Puerto Rico, the Virgin Islands, all American embassies and legations, and American war vessels.

⁴ In former times, another exception to the operation of *jus soli* was furnished by Indians living in tribal relations. Although born within the jurisdiction of the United States, such Indians could, until 1924, become citizens only by naturalization, as in the case of other "aliens"; and at the date mentioned a full third of the Indian population of the country still lacked citizen status. An act of Congress thereupon gave citizenship to all native-born Indians. Some 250,000 Indians living on about two hundred reservations remain, however, under the guardianship of the Office of Indian Affairs in the Interior Department, and are therefore in the curious position of being both citizens and "wards." On the Indian policy of the United States, see J. P. Kinney, *A Continent Lost—A Civilization Won* (Baltimore, 1937).

persons born abroad *after* the date mentioned are such if either of the parents was an American citizen who before the child's birth resided ten years or more in the United States or its possessions, at least five years of which were after attaining the age of sixteen—although in this latter case the child must reside in the United States not less than five years between the ages of thirteen and twenty-one. In any event, an oath of allegiance must be taken at the age of twenty-one.

2 By
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(a) Of
inhabit-
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annexed
terri-
tories

The second main way in which citizenship is gained is by naturalization, which means the conversion of aliens into citizens by some kind of official act. Naturalization may be either collective or individual. The most usual form of collective naturalization is the extension of citizenship to the inhabitants *en bloc* of regions acquired by purchase or conquest. Down to 1898, the United States regularly conferred citizenship upon the whole body of inhabitants of the territories which it annexed;¹ and as recently as 1927 (ten years after annexation) citizenship was similarly bestowed collectively upon all inhabitants of the Virgin Islands who did not elect to retain their Danish citizenship. On the other hand, the treaty of peace with Spain in 1898 by which the United States acquired Puerto Rico, Guam, and the Philippines expressly provided that the cession of these islands should not of itself operate to naturalize their native inhabitants, whose civil status and political rights were left to be determined by Congress. In later statutes, Congress declared the Puerto Ricans and Filipinos citizens of their respective islands, and conferred upon the former most, and upon the latter some, of the privileges and immunities of citizens of the United States. Furthermore, the Supreme Court held that Puerto Ricans were not aliens in the sense in which the term is used in the immigration laws.² So that, although full American citizenship was withheld, both Puerto Ricans and Filipinos became, in international law, "nationals," no less entitled to the protection of the United States than are full-fledged citizens; and in constitutional law the distinction—at least in the case of the Puerto Ricans—was in nearly every respect one without a difference. Finally, in 1917, the Puerto Ricans were made "citizens of the United States."

(b) Of
individu-
al
aliens

Naturalization is, however, usually individual, rather than collective; and as practiced in all countries it involves the granting of citizenship by a court, or more often by some administrative officer, after the applicant has fulfilled certain prescribed conditions. Our national constitution authorizes Congress to "establish an uniform rule of naturalization"; and although it was at first supposed in some quarters that naturaliza-

¹ Except uncivilized native tribes in Alaska. In the case of Louisiana, Florida, and Alaska, the treaties of cession provided that the inhabitants should be admitted "as soon as possible to the enjoyment of all the rights, advantages, and immunities of citizens of the United States." In the case of Texas, all citizens of the previously independent republic were made citizens of the United States by resolution of Congress. American citizenship was conferred on the citizens of the former Hawaiian Republic by an act of 1900 which established a territorial government in the new dependency.

² *Gonzales v. Williams*, 192 U. S. 1 (1904).

tion was one of the concurrent powers to be exercised by the states as well as by the nation, this view was gradually perceived to be unwarranted. In 1817, Chief Justice Marshall was able to declare that it was not, and "certainly ought not to be," doubted that the power is vested exclusively in Congress.¹

The first act of Congress relating to the naturalization of individual aliens—dating from 1790—assigned the work to the courts; and under supervision of an Immigration and Naturalization Service in the Department of Justice it is now carried on by courts of designated grades, *i.e.*, all federal circuit courts of appeals and district courts, the supreme court of the District of Columbia, and all state and territorial courts of record which have a clerk and a seal and have jurisdiction in actions at law or equity in which the amount in controversy is unlimited.² The original law was brief and general, and for a hundred years much was left to chance, or at all events to the discretion of the naturalization authorities. In most states, it was necessary to be a citizen in order to be a voter. Party organizations and candidates were, therefore, under strong temptation to procure the naturalization of all alien residents whose votes they thought they could control; and plenty of grave abuses resulted. Following an extensive investigation by a commission appointed by President Theodore Roosevelt, Congress in 1906, however, enacted a far more adequate statute, under which—as revised and extended most recently by a comprehensive Nationality Act approved October 14, 1940³—the work is now carried on in a considerably improved fashion.

The stipulated procedure is more complicated than in most other countries, and involves three main steps. The first—commonly referred to as "taking out first papers"—is a declaration of intention to become a citizen, which must be filed with the clerk of a duly authorized federal or state court at least two years before the applicant is given his final examination.⁴ The second is the filing of a petition (not less than two years nor more than seven years after the declaration), affirming that the applicant has been a resident of the United States for at least five years continuously and of the state or territory in which he applies for at least six months, that he is neither an anarchist nor a polygamist, and that he expects to remain permanently in this country and is loyal to it and its institutions. Full information must be given about both the candidate and his family (if he is married); and the application must

Present
mode of
natural-
ization

¹ *Chirac v. Chirac*, 2 Wheaton 259.

² In all, some 1,690 state courts and about 270 federal courts now qualify for exercise of the power.

³ 54 *U. S. Stat. at Large*, 1137. This major statute now constitutes the general law on the subject, but the earlier laws will be found brought together in *Naturalization, Citizenship, and Expatriation Laws; Naturalization Regulations* (Washington, Govt. Printing Office, 1936), and E. A. Lewis [comp.], *Naturalization Laws, May 9, 1918-July 19, 1940* (Washington, Govt. Printing Office, 1940). See C. C. Hyde, "The Nationality Act of 1940," *Amer. Jour. of Internat. Law*, XXXV, 314-319 (Apr., 1941), and for full text of the act, *ibid.*, "Documents" section, 79-124.

⁴ The applicant must be at least eighteen years of age.

be supported by affidavits of two citizens testifying to the applicant's period of residence and his moral character. The third step, taken not less than ninety days after the petition is filed, is a public hearing and examination by the judge, after which, if all goes well, that official authorizes the clerk of the court to issue letters of citizenship, or "final papers." During the interval, the petitioner's claims are investigated by a federal naturalization examiner, who may merely present his findings in writing but may also appear at and take part in the hearing; and in nearly every case, the commissioner's findings determine the action taken by the court.¹

Still
room for
improve-
ment

Although tightened up considerably of late in respect both to qualifications for naturalization (as freshly defined in the Nationality Act of 1940²) and methods of actual administration, the system still leaves a good deal to be desired. The examination by the judge may be as thorough, or as perfunctory, as he cares to make it. The applicant must swear that he "speaks English"; but ability to utter "yes" and "no" sometimes suffices, and indeed one judge is reported to have been satisfied with a candidate who merely "nodded his head in English!"³ The law presumes intelligence, but provides no standards by which that somewhat flexible qualification is to be judged. It presupposes some knowledge of the form of government of the United States, but leaves the way open for the widest latitude in testing such knowledge.⁴ "Final papers" cannot be issued within thirty days preceding any federal or state election;

¹ After 1939, war in Europe and the later realized threat of global war powerfully stimulated the interest of aliens resident in the country in gaining the advantages of American citizenship. The number of naturalizations rose to 275,000 in 1941, in 1943, 318,000, and in 1944, 435,000. Even alien enemies can be naturalized in wartime if they are able to meet certain special conditions. The total number of aliens in the country (some five millions in 1940) dropped to 3,400,000 on July 31, 1944—the smallest figure in thirty-five years.

² Sec. 305 of this statute goes into much detail in debarring opponents of organized government, persons advocating overthrow of the government of the United States, and persons evidencing tolerance toward violence and sabotage.

³ The appearance of Dr. Albert Einstein before a citizenship examiner in Princeton, New Jersey, in the summer of 1940 was hailed by the paragraphers with considerable hilarity. It is a matter of record that he acquitted himself rather more creditably than the Italian who, after the judge had lectured him on the significance of the American flag, replied, in answer to the question asked him in desperation, What flies over City Hall?—"Peejuns."

⁴ Applicants are required also to take an oath to "support and defend the constitution and laws of the United States," and are asked whether they are willing, in event of necessity, to "take up arms in defense of this country." Much discussion of the status of "pacifists" in relation to this requirement was stirred by the case of Rosika Schwimmer in 1929 and those of Douglas C. MacIntosh and Marie Bland in 1931, in all of which the Supreme Court, on appeal, denied the right to be naturalized. *United States v. Schwimmer*, 279 U. S. 644; *United States v. MacIntosh*, 283 U. S. 605. Madame Schwimmer, a high-minded and sincere woman of Hungarian birth, declared herself opposed not only to military service but to the entire system of "common defense" which, as the Court remarked, is "one of the purposes for which the people established and ordained the constitution." Dr. MacIntosh, a professor of theology at Yale University and a chaplain in the first World War, disclaimed being a pacifist, but confessed to holding religious views which prevented him from promising in advance to bear arms in any war in which the country might be involved, whether or not he believed it to be morally justified. See H. B. Hazard, "Attachment to the Principles of the Constitution as Judicially Construed in Certain Naturalization Cases in the United States," *Amer. Jour. of Internat. Law*, XXIII, 783-808 (Oct., 1929).

nevertheless, over-zealous ward-leaders and other politicians contrive, by plenty of sharp practices, to get tractable aliens through the mill in time to round them up at the polls.*

More than a generation ago, an investigating commission appointed by President Theodore Roosevelt found the courts unsatisfactory as naturalization authorities, but conceded that no other available machinery would be an improvement upon them. The federal courts have, on the whole, a better record than the state and territorial tribunals, and it has often been suggested that the power to naturalize be withdrawn from the latter altogether—to which, however, it is objected not only that the federal courts are themselves not above reproach in the matter, but that the plan would give undue advantage to aliens in the larger cities, where the federal courts are commonly located. A logical step would be to set up a system of naturalization offices under the sole control of the federal Immigration and Naturalization Service and liberate the courts from the business entirely; as a matter of fact, Canada is the only other country in which naturalization by courts prevails. This, however, would be expensive, especially if the agencies of naturalization were to be extended into every community, and it is fair to assume that naturalization by judges will continue, although with increasing reliance on assistance furnished by administrative officers, chiefly the naturalization examiners.¹

The courts not satisfactory as naturalizing agencies

Not all aliens, it must be observed, are eligible for naturalization, but only such as, in addition to meeting all other requirements, are white persons, persons of African nativity or descent, Chinese, or descendants of races indigenous to the Western Hemisphere. Chinese (both older residents and the few newcomers legally admissible as immigrants²) have been eligible only since 1943; and other Asiatics—Japanese, Koreans, Burmans, etc.—are still excluded by judicial interpretation as not falling in any of the four categories mentioned above.³ Although regarded as of the Caucasian race, Hindus are likewise under the ban as not being white persons in the meaning of American law. As we have seen, however, children born of Asiatic parents resident in the United States and subject to its jurisdiction are citizens by birth.

Aliens who are ineligible

¹ H. B. Hazard, "The Trend Toward Administrative Naturalization," *Amer. Polit. Sci. Rev.*, XXI, 342-349 (May, 1927). The best discussion of naturalization in all of its aspects is L. Gettys, *The Law of Citizenship in the United States*, Chaps. III-IV, VI.

² See p. 121, note 1, above.

³ Among decisions, see *Ozawa v. United States*, 260 U. S. 178 (1922); *Toyota v. United States*, 268 U. S. 402 (1924). In the case of mixed races, it is held that in order to be eligible for naturalization, the applicant must be *preponderantly* white or African or now, presumably, Chinese. Filipinos have been held incapable of naturalization because of not being "aliens"—although, somewhat inconsistently, those who served in the American armed forces in the first World War have, by statute, been declared eligible.

Other Aspects of Citizenship

Citizen-
ship of
married
woman

Formerly, an alien woman marrying a native-born or naturalized American citizen automatically became herself an American citizen,¹ and, conversely, an American woman marrying an alien forthwith lost her citizenship. In other words, a married woman's status was determined entirely by that of her husband. As a result of persistent agitation led by various women's organizations, this is no longer true. Prompted by unhappy experiences of women under the operation of the rule during the World War of 1914-18 (*e.g.*, American-born women who had married Germans and now suddenly found themselves classed as alien enemies in the United States), and by growing recognition of women's claim to their own individuality as members of the body politic, Congress in 1922, 1930, and 1931 conferred upon them progressively expanded rights of independent citizenship, and, finally, in 1934, made nationality rights as between the sexes equal and uniform in every respect. An alien woman marrying a citizen of the United States now becomes a citizen only if naturalized (on somewhat easier terms than in the usual case); and an American woman marrying an alien retains her American citizenship (even though her husband is ineligible to naturalization) unless she chooses to renounce it.²

How citi-
zenship
may be
termi-
nated

Citizenship, once possessed, becomes a constitutional right and cannot be abrogated except by procedures that are themselves constitutional, *e.g.*, in accordance with due process of law. Whether acquired by birth or by naturalization, it, however, may be voluntarily relinquished, or simply lost, or, if obtained by naturalization, may be taken away as a punishment or penalty. Although doubt long hung about the matter, Congress in 1868 expressly recognized the right of a citizen to "expatriate" himself, except at a time when the country is engaged in war;³ and in 1907 it provided explicitly how this may be done, *i.e.*, by being naturalized in, or by taking an oath of allegiance to, any foreign state. Citizenship is automatically forfeited, too, if a naturalized American lives for at least two years in a foreign state of which he was formerly a national or in which he was born (providing that through such residence he has acquired the nationality of the foreign state); also if he lives as long as five years in any other foreign state.⁴ Naturalized persons, also, may be "denaturalized" by court action, *i.e.*, have their certificates of citizenship canceled for disloyal utterances or acts, the

¹ Unless, of course, racially or otherwise ineligible.

² For an excellent brief review of the subject, see L. Gettys, *The Law of Citizenship in the United States*, Chap. v, and for discussion in a broader setting, S. P. Breckinridge, *Marriage and the Civic Rights of Women* (Chicago, 1931).

³ The Nationality Law of 1940 discarded this exception.

⁴ L. Gettys, *op. cit.*, Chap. vii. Contrary to a general impression, conviction of crime, followed by imprisonment, does not ordinarily abrogate citizenship. What the offender commonly loses, along with his personal liberty, is merely the privilege of voting—although various rights of citizenship may also be lost if the court so decrees.

presumption being that they did not take the oath of allegiance in good faith. A law of 1906 covering this matter was invoked several times during the first World War; there was further legislation on the subject in 1940-42; and at the end of the first year of the present war, forty-two members of the German-American Bund and other naturalized citizens found to be disloyal had been denaturalized, three hundred other suits were pending in the courts, and 2,500 cases were being actively investigated.¹

Nations adhering to the principle of *jus sanguinis* have been inclined to claim as citizens children born abroad to parents who were citizens of the nation making the claim. Nations, however, following the principle of *jus soli* have claimed such children as their own citizens; and out of such conflicting claims has arisen the troublesome question of "dual citizenship," or multiple nationality.² Not that nations have commonly recognized any such thing as dual citizenship; each has been wont to recognize only its own citizenship as having validity. Such rival claims, nevertheless, can easily bring hardship to the persons involved. The matter is mentioned here chiefly because it has lately been brought to the fore in this country by the situation of large numbers of Japanese. Japan follows *jus sanguinis*; and although in 1924 she modified her citizenship law in the direction of accepting the principle of *jus soli* for Japanese born thereafter in any one of several designated countries (including the United States), she continued to consider as Japanese citizens any such persons declaring an intention to retain Japanese nationality or registered by their parents at a Japanese consulate as being of that nationality. As a consequence, large numbers of Japanese on the Pacific coast were, when the present war began, not only citizens of the United States, but, under Japanese law, and in many cases without having been aware of the fact, citizens of Japan as well; and the same was true in Hawaii.³ Wartime hysteria was responsible for proposals in Congress to revoke the American citizenship of many, or even all, Japanese possessing it. It is reasonable to anticipate, however, that the outcome of the war experience will rather be a final abandonment by Tokyo,

Dual
citizen-
ship

¹ L. Preuss, "Denaturalization on the Ground of Disloyalty," *Amer. Polit. Sci. Rev.*, XXXVI, 701-710 (Aug., 1942). Much interest was aroused in 1943 by the government's attempt to revoke the citizenship of a certain William Schneiderman on the sole ground that at the time of his naturalization in 1927 he was an active member of the Communist party, and, being such, could not sincerely declare adherence to the constitution of the United States. In *Schneiderman v. United States* (320 U. S. 118, 1943), the Supreme Court frustrated the effort by reversing a circuit court decision, mainly on the ground that it had not been established that belief in communism was, at least as matters stood in 1927, incompatible with attachment to the American system of government.

² The term "dual citizenship" is sometimes employed also to designate the national-state aspect of citizenship, which, of course, is quite a different matter from that here in mind.

³ A few months before Pearl Harbor, some 30,000 Hawaiian "dual citizens" petitioned the government at Washington for relief, in some fashion, from Tokyo's claims upon them. See C. H. Coggins, "The Japanese-Americans of Hawaii," *Harper's Mag.*, CLXXXVII, 75-83 (June, 1943).

under pressure of military defeat, of any and all citizenship claims upon Japanese holding citizenship in this country.¹

Recognition not only that the country can offer no higher privilege than citizenship, but also that new citizens ought to be encouraged and helped to prepare themselves for proper discharge of their obligations, has led in recent years to various special efforts aimed at civic education for the foreign-born. To prepare applicants for the examination that they must undergo, as well as to furnish a fund of pertinent general information, the Immigration and Naturalization Service has for some time given wide distribution to "readers" or handbooks for candidates for naturalization, bearing such titles as *Introduction to America* and *Our Constitution and Government*.² Planning still more ambitiously, it in 1940 procured the President's approval for launching a nation-wide citizenship education program, to involve the expenditure of millions of dollars and to supplement and amplify citizenship education projects already operating in many of the states, with emphasis naturally in areas where heavy alien populations indicated special need. Under the supervision of an advisory board, operating largely through state offices, teacher-training programs have been instituted, special teaching aids devised, and classes organized which, although interfered with by the war, are expected eventually to reach at least a million of the foreign-born.³ Congress, too, took cognizance of the problem when, in 1940, it set aside the third Sunday in May of each year as "Citizenship Day," with the idea that appropriate local ceremonies designed not only for the recently naturalized, but also for native-born citizens lately attaining the age of twenty-one, would prove interesting and stimulating to the body politic in general.

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CHAPTER IX

CIVIL RIGHTS AND HOW THEY ARE PROTECTED

Authority
vs.
liberty

In the entire realm of public affairs, there is no more basic or difficult problem than that of maintaining a proper balance between authority and liberty. To be worthy of the name, a government must have authority. Yet if it is not to be arbitrary and tyrannical, there must be restrictions upon how far it may go in regulating the actions and relations of those who live under it. In Nazi Germany and Fascist Italy—in Japan too—the world has lately had distressing demonstrations of what comes of permitting the state to set up as an end in itself, with men and women reduced to mere pawns in the hands of arrogant and irresponsible governments; and against such “authoritarianism,” or “totalitarianism,” the free peoples of the earth have been waging the greatest war in history. The concept to which these peoples are attached is a very different one, namely, that of the state as a sort of social framework within which government operates with only such authority and powers as the sovereign people, by direct act or tacit consent, have conferred upon it, leaving, consequently, to the people themselves rights and liberties which they can defend and enforce against all governmental agencies. In the present chapter, we propose to inquire into the way in which this works out in our American system.

Some General Features

1. How
civil
rights
arise

The first major fact to be observed is the already familiar one that with us government, on whatever level, carries with it only limited powers, and that the restrictions, or at any rate the bases on which they rest, are laid down in written federal and state constitutions. National and state (including, of course, local) governments alike are not sovereign authorities, but merely agencies or instrumentalities created by the only sovereign that we recognize, *i.e.*, the people. Powers have been conferred or assented to—many of them—but not all power. To put it differently, the people have reserved to themselves large areas of freedom which government is forbidden to invade—forbidden in some cases negatively through the simple omission of any constitutional authorization, in other cases positively through express injunctions and prohibitions contained in constitutional “bills of rights,” both national and state. On the one hand, a person owes the various governments resting upon him loyalty, obedience, and service; on the other, he has a valid claim upon them for observance and protection of rights and liberties which are

often thought of as having been granted to him, but which, more truly, he has reserved for himself.¹

A second cardinal feature of our system of rights is its very great complexity. There are rights which can be claimed by citizens only and others to which all inhabitants, aliens included, are alike entitled—although normally the differences are not great.² There are rights which are applicable only to natural persons, as human beings, and others (relating particularly to property) which apply, as well, to “artificial persons” such as corporations. The main complicating circumstance, however, is, of course, our federal form of government; for from this it results (1) that there are rights guaranteed as against the national government only, others as against state governments only, and still others—many of them—as against both national and state governments; (2) that of rights that can be asserted as against state governments, some rest upon restrictions laid down in the national constitution, others upon restraints originating in the states themselves; and (3) that consequently there is latitude for variation from state to state, even though in practice such differences as appear are rarely of much significance.

2. Complexity of the American system

A third fact is that if any one of us were to undertake to compile a complete and definitive list of the civil rights to which he individually is entitled, he would be doomed to failure. He could carry his catalogue to a considerable length, but in the end he would become lost in doubts and obscurities. Naturally, he would turn to the national constitution, and afterwards to the constitutions of the states. But what would he find? In the former, he would discover—chiefly in the first eight amendments³—a long and impressive list, followed, however, by the baffling provision of the Ninth Amendment that “the enumeration . . . of certain rights shall not be construed to deny or disparage others retained by the people.” What others? No man can say conclusively. Similarly, he would find in all of the state constitutions articles and sections in form or in effect comprising bills of rights, besides scattered clauses pertinent to his inquiry. But in no instance would he come upon any indication that the rights mentioned form a full and exclusive list. Quite the contrary. Nor would he be helped out of his dilemma by consulting judicial deci-

3. No full enumeration possible

¹ *Rights and liberties*, he it observed, rather than *privileges*. Confusion often arises at this point. One has a right, as we shall see, to freedom of speech, religious liberty, and due process of law. He has no such right to vote, to hold public office, or to practice medicine. One may vote only if given the privilege, hold office only if appointed or elected thereto, practice medicine only if licensed to do so. One's *rights* in such matters are confined to seeking the privilege in the first place, and to exercising it, when once attained, without restraint except as duly prescribed by law.

In his annual message to Congress under date of January 11, 1944, President Franklin D. Roosevelt urged for the nation the adoption of a “second,” or economic, bill of rights. The rights with which we are here concerned are primarily political, although with numerous highly important implications for an “economic democracy.” After all, political rights form the cornerstone on which the entire structure of a free society must rest.

² For comment on the rights of aliens, see pp. 122-126 above.

³ Also in Art. 1, § 9, cls. 2-3; Art. III, § 2, cl. 3, and § 3.

sions; for although the Supreme Court, in the Slaughterhouse Cases in 1873,¹ went into the matter in some detail, it made no pretense to covering it exhaustively. On the contrary, the Court, speaking of guarantees contained in the federal constitution, said that interpretation of them must be "a gradual process of judicial inclusion and exclusion"; and the same is true of rights guaranteed by constitutions of the states. The truth is that there is nowhere, in the constitutions or outside of them, any enumeration that purports to be complete. The national government has limited and enumerated powers. The state governments have powers both enumerated and residual—but nevertheless limited. As against these governments, taken together, the people have whatever rights and liberties are expressly guaranteed to them, and, in addition, all that are not definitely denied or otherwise inconsistent with the instrument under which they are claimed.²

4. Changes constantly going on

Even, however, if one had a complete picture of rights and liberties as they exist today, it would not hold true tomorrow; far from being fixed and static, the conditions and concepts determining the nature and scope of recognized rights (especially as construed by courts prone to differ among themselves, and not above reversing their own positions) are perennially undergoing change. As a single illustration may be cited the fact that whereas formerly the states were free, so far as the federal constitution was concerned, to go as far as they liked in restricting freedom of religion, speech, press, and assembly, the federal Supreme Court has now for twenty years held that the due process clause of the Fourteenth Amendment makes the guarantees of these liberties, as embodied in the First Amendment, no less applicable to the states than to the national government.³ Indeed, the entire matter of protecting civil liberties has been reoriented as a result of the national government taking over, under judicial construction, far wider responsibility in the field than ever was envisaged until a generation ago. The states are still partners in the protection of liberties; but the function has nevertheless been extensively nationalized.

5. Nevertheless a fairly coherent and definite system

Notwithstanding all of the complications referred to, civil rights in this country can still be recognized, defined, and classified with sufficient thoroughness and accuracy to serve most practical purposes. In fact, to a very considerable extent they constitute a single coherent system. Rights which protect the individual from encroachment by the national government are, of course, uniform the country over. The same is true of those flowing from restrictions imposed in the national constitution upon the dealings of the states with their inhabitants. And although

¹ 16 Wallace 36.

² On this basis, it would seem that President Roosevelt's much discussed "freedom from want" and "freedom from fear" might be included. For practical purposes, however, it is best to count in only such rights or liberties as have an explicit constitutional basis or as have been recognized and enforced by the courts.

³ *Citlow v. New York*, 263 U. S. 652 (1925).

those resting merely upon state constitutional provisions naturally differ somewhat from state to state, they are nevertheless sufficiently similar to enable one to say that civil rights are approximately the same for all of our people.

Liberty is not license, and rights are relative, not absolute. After all, one of the main purposes of government is to prevent the safety and well-being of the many from being jeopardized by the few. Freedom of speech and press does not carry with it any right to incite persons to crime or panic; freedom of assembly does not entitle any group to interfere with public order and safety. To be validly claimed, a right must be exercised so as to cause no impairment of the same or any other right possessed by others.¹

6. Right
not
absolute

One week after the Japanese attack at Pearl Harbor, the one hundred-fiftieth anniversary of the adoption of the federal Bill of Rights, i.e., the first ten amendments to the constitution, was celebrated throughout the country with many protestations of loyalty to our basic principles and guarantees of liberty. No intelligent person could have failed to realize, however, that the period of war which we had entered would subject the entire structure of civil freedom to tremendous stresses and strains; for with the nation's life at stake, rights become more than ever relative; even liberties have to be "rationed." The record of the first World War in this respect was indeed depressing. Playing fast and loose with the terms of an Espionage Act of 1917 and a Sedition Act of 1918, the Department of Justice not only ferreted out and brought to punishment persons who by any reasonable standards were guilty of offenses against the national morale, but embarked upon, and for a time after the end of hostilities kept up, with even greater vigor, a veritable "witch-hunt" in the course of which gross wrongs were committed, especially as affecting aliens. Many states, too, succumbed to the excitement of the hour, and some have on their statute-books to this day illiberal laws then enacted.

7. The
special
problem
of civil
rights in
wartime

What the final record of the present war period will be, it is too early to say.² The Espionage Act of 1917 has been brought back into full operation; a drastic code of regulations embodied in the Alien Registration Act of 1940, and reviving many of the features of the lapsed Sedition Act of 1918, is in full effect; supplementary legislation, both national and state, has been enacted. Properly enough, there has been a tightening up, especially as against suspected "fifth columnists." On

¹ "Neither property rights nor contract rights," said the Supreme Court in the case of *Nebbia v. New York* (291 U. S. 502, 1934), "are absolute. . . . Equally fundamental with the private right is that of the public to regulate it in the common interest."

² In 1939, a special civil liberties unit was established in the criminal division of the Department of Justice, charged with studying the provisions of the constitution and laws relating to civil rights "with reference to present conditions," making recommendations, and directing prosecutions of violations in all cases in which the federal government could assume jurisdiction.

the other hand, the President and Department of Justice have insisted that civil liberties of every kind continue to receive all reasonable protection; the Supreme Court, although frequently dividing according to a left wing-right wing pattern on the cases heard, has usually given the benefit of the doubt to liberties claimed; and, in general, the record has been good.¹ Perhaps the greatest challenge will come after the war, when, assuming, as we must, that Nazi and Fascist doctrines will continue to have some following in our midst, we shall be confronted with the question of whether to disavow our faith in the principles of civil liberty by denying such liberty to people holding views akin to those of our defeated enemies.²

Numerous and varied as they are, civil rights fall rather naturally into (1) those relating to personal status and (2) those having to do with property. On a different basis of classification, they are also either (1) *substantive*, i.e., pertaining to the fact and essence of freedom or (2) *procedural*, i.e., relating to the methods by which freedom is protected. The brief survey that can be presented here will follow these broad categories.³

Rights of Personal Liberty: I. Substantive

1. Immunity from slavery and involuntary servitude

→ So long as Negro slavery prevailed within our borders, no general immunity from personal servitude was, or could be, asserted. The Thirteenth Amendment, however, dating from 1865, prohibits throughout the United States and in all places under its jurisdiction not only slavery but every form of "involuntary servitude except as a punishment for crime whereof the party shall have been duly convicted." According to the Supreme Court, involuntary servitude does not arise when a person is held against his will to the completion of a period of service upon which he has entered (e.g., as a seaman), but on the other hand does arise if a laborer who is indebted to his employer is required, on penalty of going

¹ As Professor Cushman has pointed out, World War I found legislatures, courts, and people inexperienced and unprepared in this important field, and bad mistakes were made. By 1911, we had the advantage of extensive, and some costly, experience, and were prepared to approach the whole matter more sanely. See "Civil Liberties" [during our first year in World War III, *Amer. Polit. Sci. Rev.*, XXXVII, 49-56 (Feb., 1943)]. The principal lapses during this war have taken the form of efforts to purge the federal service of officers and employees holding views regarded in certain quarters as objectionable; certain discriminations against Negroes, e.g., in war industries; and, in the opinion of some people, the evacuation in 1942 of loyal as well as disloyal, citizen as well as non-citizen, Japanese living in areas adjacent to the Pacific coast. For an excellent survey of the country's earlier experiences with wartime civil liberties, see C. B. Swisher, "Civil Liberties in War-Time," *Polit. Sci. Quar.*, LV, 321-347 (Sept., 1940); also the article by R. E. Cushman cited in the next footnote. See also O. K. Fraenkel, *Our Civil Liberties* (New York, 1944), Chap. III, and A. G. Hays, "Civil Liberties in War-Time," *Bill of Rights Rev.*, II, 170-182 (Spring, 1942); *Iowa Law Rev.*, XXIX, 379-480 (Mar., 1944), symposium on constitutional rights in wartime.

² This matter is discussed at length in R. E. Cushman, "Civil Liberty After the War," *Amer. Polit. Sci. Rev.*, XXXVIII, 1-20 (Feb., 1944).

³ Some special aspects of civil rights in wartime are considered in a later chapter (see pp. 661-663 below).

to jail, to work out the debt in the employer's service.¹ A federal statute forbids this form of peonage, and so do various state constitutions and statutes; many state constitutions, indeed, forbid imprisonment for debt under any circumstances. Involuntary service in the Army, or compulsory work on the highways—falling within the legitimate exercise of the military or police power—does not constitute "servitude."

The First Amendment forbids Congress to make any law "respecting the establishment of religion or prohibiting the free exercise thereof"; and the same restriction is imposed upon the states, not only by similar provisions in all of their own constitutions, but by judicial construction in later years making the Fourteenth Amendment's due process clause applicable to all forms of state action. The Supreme Court has held that these guarantees of religious liberty do not confer any right to violate a criminal statute in the name of religion; for example, they do not entitle a Mormon to practice polygamy.² But so long as there is no violation of law or breach of the peace, freedom of belief and worship must be unrestricted. Many difficult questions, however, arise. A decade and a half ago, a Tennessee statute prohibiting the teaching of the theories of evolution in the public schools was attacked on the ground of being inconsistent with a section of the state constitution which forbade giving preference by law to "any religious establishment or mode of worship." The highest court of the state, however, held that since people of all faiths are divided in their attitude on evolutionary doctrines, no "religious establishment or mode of worship" was discriminated against or jeopardized by the measure challenged.³ More recently, questions of religious liberty (in many instances involving also freedom of the press) have been brought to the fore by the beliefs and practices of an aggressive sect known as Jehovah's Witnesses—an organization which in five or six years has been responsible for more judicial decisions touching the subject than were recorded in the entire previous history of the country. Not even an outline of this extraordinary chapter (which promises to continue indefinitely) can be presented here. But it may be noted (1) that whereas in 1940 the federal Supreme Court held that school boards might exclude from public schools pupils who refuse to salute the American flag, "symbol of our national unity," regardless of religious scruples on the part of the children or their parents⁴ (the sect referred to opposes such salutes as savoring of idolatry), three years later it reversed itself by holding invalid a regulation of the state of West Virginia requiring the salute from school children, on penalty of expulsion;⁵ and (2) that, while refusing to countenance disturbances

2. Freedom of religion

¹ The latter principle has lately been reaffirmed in *Taylor v. State of Georgia*, 315 U. S. 25 (1942), a case involving a Negro held to labor under the Georgia contract labor law—a law, said the Court, violating the Thirteenth Amendment.

² *Reynolds v. United States*, 98 U. S. 145 (1878).

³ *Scopes v. State*, 154 Tenn. 105 (1927).

⁴ *Minersville School District v. Gobitis*, 310 U. S. 586 (1940).

⁵ *West Virginia State Board of Education v. Barnette*, 319 U. S. 624 (1943).

of the peace or other infractions of reasonable police regulations, the Court, in numerous cases, has sustained appeals against municipal ordinances requiring the sect's canvassers to take out peddler's licenses before distributing their books and tracts and soliciting contributions from door to door. In a notable case in 1942, the Court did, indeed, hold that, since the canvassers were in effect selling their literature, their activities were primarily commercial rather than religious, and therefore might properly be subjected to license and payment of fees.¹ The decision, however, which was of the hair-line variety (five to four), was widely regarded—even by people who considered the Witnesses public nuisances—as reactionary; and in the following year a Court with a slightly changed personnel reversed it.² On the whole, the interests of religious freedom are being satisfactorily protected, even though, in practice, some favoritism is often shown Christianity, as, for example, in laws relating to Sabbath observance or requiring Bible-reading in the public schools.³

8. Freedom of speech and press

Cultural progress and democratic government alike presuppose all reasonable freedom of the people to engage in discussion, to write, and to print; and in the First amendment to the federal constitution, as well as in nearly all of the state constitutions, will be found clauses intended to protect political discussion and criticism, along with the interchange of opinion generally, against censorship and repression such as that which of late so completely stifled all dissenting thought and expression under the Nazi and Fascist dictatorships in Europe. No guarantee of a right better illustrates, however, the presumption of propriety and rationality upon which all civil rights are predicated. It was manifestly not intended that freedom of speech and press should extend to the utterance or publication of libels and indecencies, the incitement of insurrection, the encouragement of disobedience to law, the defamation of the government, or giving aid and comfort to foreign states in making war upon the United States; and the federal constitution had been in operation less than a decade before Congress passed a Sedition Act (1798) laying heavy penalties upon encouraging insurrection or other disorder, publishing "false and

¹ Jones v. Opelika, 316 U. S. 584 (1942).

² Murdock v. Pennsylvania, 319 U. S. 105 (1943). On this interesting chapter in our civil-rights experience, see V. Rotnem and F. G. Folsom, Jr., "Recent Restrictions upon Religious Liberty," *Amer. Polit. Sci. Rev.*, XXXVI, 1053-1068 (Dec., 1942); J. E. Mulder and M. Conisky, "Jehovah's Witnesses Mold Constitutional Law," *Bill of Rights Rev.*, II, 262-268 (Summer, 1942); and comments by R. E. Cushman in *Amer. Polit. Sci. Rev.*, XXXVII, 278-280 (Apr., 1943), and XXXVIII, 277-284 (Apr., 1944). Cf. O. K. Fraenkel, *Our Civil Liberties*, Chap. vi.

³ For comment on these latter matters, see G. I. Haight and C. H. Lerch, "Freedom of Religion," *Bill of Rights Rev.*, II, 111-118 (Winter, 1942). The treatment extended to persons unwilling, because of religious beliefs or on other grounds of conscience, to render military service is in line with our generally liberal policy. Congress has full power to exact such service of all, but in both of our last two great wars it has permitted draft boards to call "conscientious objectors" only for non-combatant service in the Army, or in case of those opposed even to that form of service, for employment only in park improvement or other useful work in civilian camps.

malicious writings" against the government, or inciting any foreign power to make war upon the country. This particular measure flowed from an unfortunate outburst of Federalist partisanship, and after the Jeffersonian Republicans came into power they not only allowed it to lapse, but liberated the prisoners held under it and repaid the fines that had been assessed.

For more than a century and a quarter thereafter, legislation on similar lines was enacted only to meet temporary wartime situations. During the Civil War, the "war powers" of the government were construed to extend to the suppression of newspapers, the arrest and imprisonment of editors, and the punishment of speakers accused of encouraging rebellion or seeking to weaken the morale of Unionist supporters. And during the first World War an Espionage Act of 1917 and a supplementary Sedition Act of 1918 laid heavy penalties, not only on all persons who, by speaking or writing, sought to turn sentiment against the war, but on all who wrote, printed, or published any "disloyal, scurrilous, or abusive" language about the constitution or form of government of the United States. Although regarded by many people as unnecessary, and unquestionably working injustice in some cases, these measures were enforced vigorously (nearly five thousand persons were prosecuted under them, and some two thousand convicted);¹ and when tested in the courts, they were in nearly every instance sustained.

The act of 1918 was repealed in 1921. But the 1917 measure was still on the statute-book, ready to be invoked, when we entered World War II. In the meantime, two significant things had happened. In the first place, as indicated above, the Supreme Court, after long hesitating, had in 1925 construed the due process clause of the Fourteenth Amendment as making the fundamental guarantees of the First Amendment covering speech and press applicable to the states—which meant that the rights involved had been nationalized, with the states no longer free, as in the past, to abridge or destroy them.² In the second place, a vigorous drive dating from the 1920's had led to inclusion in the Alien Registration Act of 1940 of a series of five sections comprising our first *peacetime* sedition law since that of 1798, and placing the most drastic national restrictions on freedom of speech and press in our history.³ Of course, this measure was adopted at a time when the country was especially imperiled by subversive elements. Nevertheless, its enactment, when we were still at peace, and, more particularly, its strong terms, startled

¹ See, for example, *Schenck v. United States*, 249 U. S. 47 (1919); *Debs v. United States*, 249 U. S. 211 (1919).

² *Gitlow v. New York*, 268 U. S. 652 (1925); *Near v. Minnesota ex rel. Olson*, 283 U. S. 697 (1931).

³ Not only did this legislation make speech and publication punishable if construed as tending to have illegal consequences at any possible future time, as well as at present, but it abandoned the doctrine that guilt is personal and made it a crime to be associated with any organization or society which might at any time be found to have subversive purposes.

a good many people. At all events, when war burst upon us in 1941, we had on the books a very large part of the legislation required for the new emergency. The principal addition thereafter made took the form of a section of the First War Powers Act (1941) under which President Roosevelt set up an Office of Censorship charged with inspecting all private communications entering or leaving the country by mail, cable, radio, or other means.¹

Few problems present greater difficulty than that of drawing a line between what is permissible and what is not in the matter of speech, communications, and publication. The general principle is clear; fundamentally, speech and press are free. Even in normal times, however, there are limits: freedom must not be allowed to become license; character and reputation must be protected against slanderous attack; where individual right clashes with the interests of public order or security—perchance even with the authority of the government itself—the latter must prevail. And in wartime, the bounds to which curtailment may go seem to be fixed only by the dictates of national defense and military necessity.²

Congress, further says the First Amendment, shall make no law abridging "the right of the people peaceably to assemble, and to petition the government for a redress of grievances"; and state constitutions commonly lay the same restraint upon state legislatures. Like other rights, that of holding public meetings is not absolute; a meeting cannot be allowed to block traffic on city streets, to spread disease, to become riotous, or to be employed for purposes of agitation against law and government. In cities, therefore, it is usual to require a permit from the mayor or other officer for holding any meeting in streets or parks; and while there is supposed to be no restraint except that which a reasonable exercise of the police power entails in the interest of public health, safety, morals, and convenience, over-zealous authorities undoubtedly make it difficult at times for people of radical inclinations to hold meetings of actually innocent character.³ As for petition, the main question that has arisen is as to whether the right to present a petition involves the right

4. Right
of assem-
bly and
petition

¹ B. K. Price, "Governmental Censorship in War-Time," *Amer. Polit. Sci. Rev.*, XXXVI, 837-849 (Oct., 1942). For a brief discussion of freedom of speech and press in wartime, see E. W. Puttkammer [ed.], *War and the Law* (Chicago, 1944), 17-37.

² The principal books on the subject are Z. Chafee, *Freedom of Speech* (New York, 1921)—inspired by the experiences of 1917-20—and the same author's *Free Speech in the United States* (Cambridge, Mass., 1941). Cf. O. K. Fraenkel, *Our Civil Liberties*, Chap. VII, and F. Thayer, *Legal Control of the Press* (Chicago, 1944), especially Chap. III.

³ The right of assembly, in this aspect, received notable vindication in 1937 in the case of *DeJonge v. Oregon* (299 U. S. 353), in which the federal Supreme Court reversed the supreme court of Oregon, which had upheld police arrests of persons attending a peaceable meeting under the auspices of the Communist party. In doing this, the Court for the first time brought freedom of assembly expressly under the protection of the due process clause of the Fourteenth Amendment. On the general subject, see J. M. Jarrett and V. A. Mund, "The Right of Assembly," *N. Y. Univ. Law Quar. Rev.*, IX, 1-38 (Sept., 1931); Anon., *Freedom of Assembly and Anti-Democratic Groups* (Washington, D. C., 1941).

to have it heard and considered. Theoretically, such a deduction would seem obvious, but in practice it does not follow. Congress, every year, is flooded with petitions and memorials on all sorts of subjects. Received without opposition, printed in the *Congressional Record*, and usually referred to appropriate committees, they, however, are almost invariably pigeonholed and not heard of afterwards; otherwise the two houses would have time for little else.

"A well regulated militia," says the Second Amendment, "being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed"; and more or less similar provisions are found in many of the state constitutions. The arms referred to are those of the soldier. Under the police power, the "bearing" of arms intended for private use may be regulated and restricted by both the federal government and the states; and, as is well known, there are plenty of laws forbidding the carrying of concealed weapons (pistols, revolvers, dirks, bowie-knives, sword-canes, etc.) and the sale, possession, or use of sawed-off shot-guns and other weapons not employed for military purposes but habitually used by criminals.¹ Back of the federal guarantee, as originally conceived, was the notion of defense as resting in the hands of a militia drawn directly from the people, rather than as left to a more or less professionalized standing army. This is still what we would prefer, if the times in which we live did not make a sizeable standing army imperative.

5. Right
to keep
and bear
arms

No state, says the Fourteenth Amendment, may "deny to any person within its jurisdiction the equal protection of the laws." The original intent of this provision hardly extended beyond protecting the lately emancipated Negroes against discriminatory treatment at the hands of the Southern states. In practice, it has developed into a general guarantee against arbitrary classification and other forms of discrimination, and as such it is applicable to all persons (citizens and aliens, individuals and corporations), and to all kinds of civil rights, alike. Furthermore, although the Fourteenth Amendment lays the injunction upon the states only, equal protection is regularly construed as contained within the broad concept of due process of law, and therefore as binding upon the federal government as well. On its face, the provision might seem to preclude all grouping or classification of persons or things with a view to differing status or treatment under the law.² But of course such literal construction would be an absurdity. As an American scholar has remarked, the very essence of legislation is classification; and as the courts

6. Equal
protec-
tion of
the laws

¹ See *United States v. Miller*, 307 U. S. 174 (1939), for a Supreme Court decision upholding the constitutionality of the National Firearms Act of 1934. Cf. G. I. Haight, "The Right to Keep and Bear Arms," *Bill of Rights Rev.*, II, 31-42 (Fall, 1941).

² It is to be observed that the restriction applies only to discrimination practiced by governments, or by public authorities as their agents—not as practiced by private individuals, businesses, and the like, e.g., railroads, hotels, and theaters.

have repeatedly asserted, the purport of the "equal protection" clause is merely to require that when statutory classifications are made, they shall be reasonable with respect to the end sought, and that all persons or things standing in substantially the same relation to the law shall be treated alike. Negroes may not, as such, and by legislation, be prevented from serving on juries or from voting in primaries.¹ But the Southern states are held to be warranted—with a view to minimizing racial antagonisms and promoting public order—in upholding, or even by law requiring, the segregation of whites and blacks on railway trains and in hotels and restaurants—provided always that substantially equal accommodations are made available to both. Similarly, Negroes cannot, as such, be excluded from the public schools, but may be required to attend separate schools maintained for them.²

7. "Treason" restricted by constitutional definition

In the next place, every one is protected against the possible danger of being adjudged a traitor under impetuous or partisan acts of Congress; for treason against the United States is defined by the constitution, and Congress has no power to add to the definition. As so defined, treason consists only in levying war against the United States or adhering to the country's enemies, giving them aid and comfort. Furthermore, no person may be convicted of treason except on the testimony of two witnesses, or on confession in open court;³ and while Congress fixes the penalty, it cannot in doing so impose any disability upon the convicted person's heirs or descendants.⁴ It is to be observed, however, that sedition is closely related to treason, and that Congress may go as far as it likes not only in making acts seditious, but in providing for the punishment of persons committing them. Treason trials in the federal courts of the United States have been neither numerous nor (except perhaps in the case involving Aaron Burr) dramatic; and the death penalty was never imposed for the offense until 1942, when four German-born American citizens (one in Detroit and three in Chicago) were convicted and condemned to be hanged. In point of fact, there have, to the date of writing (1945), been no actual executions; for the President, in 1943, commuted the sentence of the convict in Detroit to life imprisonment, and the ultimate fate of the Chicago trio is awaiting the outcome of appeals. John Brown, of Harper's Ferry fame, was executed for treason; but he was tried in a Virginia court and convicted of treason against "the commonwealth." Each state may not

¹ *Nixon v. Herndon*, 273 U. S. 536 (1927); *Smith v. Allwright*, 321 U. S. 649 (1944). See pp. 169-171 below.

² *Civil Rights Cases*, 109 U. S. 3 (1883); *Plessy v. Ferguson*, 163 U. S. 537 (1896). For a well-known case relating to the admission of a Negro to the law school of the University of Missouri, see *Missouri ex rel. Gaines v. Canada*, Registrar, 305 U. S. 337 (1938). The Court held that Missouri must either admit Negroes to the University law school or set up a separate law school for them; and the state did the latter. Cf. C. S. Mangum, *The Legal Status of the Negro* (Chapel Hill, N. C., 1940).

³ Art. III, § 3, cl. 1. In other words, one cannot commit treason simply by talking or conspiring against the government; he must actually do something, and there must be witnesses to what he does. R. E. Cushman, *Our Constitutional Freedoms*, 22.

⁴ *Bigelow v. Forrest*, 9 Wallace 339 (1869).

only define treason for its own purposes, but prescribe such penalties as it sees fit.¹

Rights of Personal Liberty: II. Procedural

During the political struggles of the seventeenth century in England, persons were "attainted" of treason and sent to the scaffold, or otherwise severely punished, by simple act of Parliament, with no judicial trial. Often, too, their descendants were made ineligible to hold public office, and otherwise deprived of rights and privileges. Properly enough—considering that similar practices had been by no means unknown in the American colonies—the authors of our national constitution took the position that, aside from removal from office as a result of impeachment, punishment ought to be inflicted only in pursuance of the verdict of a court of proper jurisdiction. Hence, national and state legislative bodies alike are forbidden to pass bills of attainder in any form.²

Similarly, there is full protection against *ex post facto*, i.e., "after the fact," legislation.³ An *ex post facto* law, as defined by the Supreme Court, is one which "makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action"; or one which "aggravates a crime, or makes it greater than it was when committed"; or one which "changes the punishment, and inflicts a greater punishment than the law annexed to a crime when committed"; or, finally, one which "alters the legal rules of evidence and requires less, or different, testimony than the law required at the time of the commission of the offense, in order to convict the offender."⁴ *Ex post facto* legislation is therefore criminal legislation passed after the alleged crime was committed, which, if brought to bear against an accused person, would be to his disadvantage; and the enactment of such legislation is expressly forbidden to both the nation and the states. Retroactive legislation on civil matters, and retroactive criminal legislation which is not detrimental to an accused person, e.g., a law reducing a penalty, is, however, permissible.

It is an axiom of Anglo-American jurisprudence that a person suspected or accused of crime shall have a fair trial, according to humane methods, and with the burden of proof resting on his accusers; and in both the federal constitution and the constitutions of the states the entire process of criminal justice is surrounded with restrictions to this end. Pettifogging lawyers and spineless judges too often try the public

1. Bills of attainder forbidden

2. *Ex post facto* laws forbidden

3. Judicial process regulated

¹ To the fairly extended list of substantive personal guarantees considered may be added two others which of necessity were dealt with in an earlier chapter: (1) the provision of Article IV of the federal constitution that "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states," and (2) the injunction of the Fourteenth Amendment that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

² Art. I, § 9, cl. 3.

³ Art. I, § 10, cl. 1.

⁴ *Calder v. Bull*, 3 Dallas 386 (1798).

patience by twisting these restraints to the advantage of hardened criminals. The fault lies, however, with those who abuse the protective provisions, rather than with the provisions themselves; administered properly, the latter are necessary safeguards against the conviction of innocent persons and against other miscarriages of justice. Reinforced by stipulations of similar purport in state constitutions in behalf of persons accused of violating state laws, the national constitution throws around those accused of violating federal law the following broad blanket of guarantees: ¹ (1) a person in civil life may be held to answer for "a capital or otherwise infamous crime" only on "a presentment or indictment of a grand jury"; (2) the privilege of the writ of *habeas corpus* may be denied only when the public safety, in times of rebellion or invasion, requires its suspension; (3) the accused is entitled to a speedy trial, by an impartial jury of the state and district wherein the crime shall have been committed; (4) he has a right to be confronted with the witnesses against him, to have counsel for his defense, and to avail himself of compulsory process for obtaining witnesses in his favor; (5) he may not be compelled to give evidence against himself, either orally or by producing books or papers; (6) he is given security against "unreasonable searches and seizures"; (7) he may not be "deprived of life, liberty, or property without due process of law"; (8) excessive bail may not be required, or excessive fines imposed, or cruel and unusual punishments inflicted; and (9) a person may not be twice put in jeopardy of life or limb for the same offense.

(a) Indictment
by grand
jury

Some of these guarantees call for a word of comment. Indictment by grand jury came into American usage as a highly valued English common-law procedure, and originally was provided for not only in the federal constitution but in all of the state constitutions as well. To this day, no person may be proceeded against under federal authority for "a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or the militia, when in actual service in time of war or public danger."² Presided over by the judge functioning within the given jurisdiction, a federal grand jury consists of from twelve to twenty-three persons, before whom the public prosecutor (normally a district attorney) makes accusations of crime, which thereupon are weighed privately by the jurors and either dismissed as being insufficiently supported by the evidence or made the basis of indictments charging specific persons with committing stipulated crimes. The object is, of course, to insure that no one will be inconvenienced and humiliated by being held for trial

¹ In Art. I, § 9, cl. 2, and Amendments V-VIII. The provisions noted do not apply to cases arising in the Army or Navy, or in the militia when in the active service of the United States.

² Amendment V. As defined by the Supreme Court, an "infamous crime" is one punishable by imprisonment, by loss of civil or political privileges, or by hard labor. *Ex parte Wilson*, 114 U. S. 417 (1885).

unless a substantial group of his fellow-citizens agree with the prosecutor that there is good reason for it being done. The procedure, however, tends to be cumbersome, slow, and otherwise unsatisfactory, and several of the states (amending their constitutions in so far as necessary) have substituted, all around or for certain types of cases, a simpler process under which the grand jury is dispensed with and the prosecutor (usually a county attorney) merely files an "information," or affidavit, against a person under suspicion. And in reply to argument that this constitutes a denial of the due process of law guaranteed by the Fourteenth Amendment, the Supreme Court has said that while due process was once supposed to require indictment by grand jury, the new method is none the less due process simply because of being new.¹ The grand jury, however, could not be replaced in *federal* procedure without amending the national constitution.

The privilege of the writ of *habeas corpus*—"the most important single safeguard of personal liberty known to Anglo-American law"—is guaranteed or assumed, within the appropriate spheres, by both national and state constitutions. By virtue of it, any person arrested or otherwise detained on suspicion of crime may request an immediate hearing in court with a view to determination of whether there is adequate ground for his detention. The writ is addressed by the court (federal or state, as the case may be) to the officer having custody of the suspect and directs that the petitioner's "body" be brought into the court's presence. If it develops that the prisoner is being held contrary to law, he will be given his freedom; otherwise, he will be held for trial, with or without release on bail.² Under constitutional provision, the privilege of the writ may be suspended by federal authority only "when in cases of rebellion or invasion the public safety may require it."³ On the question of *who* may suspend, the constitution is silent; and usage has varied. Largely supported, however, by the Supreme Court in the famous Civil War case of *Ex parte Milligan*,⁴ the best opinion is that the function properly belongs to Congress but, under proper conditions, may be exercised by the president in pursuance of express congressional authorization. Some of the states, within their own spheres, have forbidden the writ's suspension altogether.⁵

¹ *Hurtado v. California*, 110 U. S. 516 (1884).

² Bail is money or property deposited by an accused person, or by his sureties, as a pledge that he will appear for trial. The federal constitution stipulates, as do most of the state constitutions, that excessive bail shall not be required.

³ Art. I, § 9, cl. 2. The only situation normally regarded as justifying suspension is one in which the regular courts are not in operation and martial law has been proclaimed. See R. S. Rankin, *When Civil Law Fails* (Durham, N. C., 1939).

⁴ 4 Wallace 2 (1866).

⁵ In July, 1912, seven Nazi saboteurs, apprehended after entering the country surreptitiously, and being, by presidential direction, brought to trial before a special military commission, appealed to the federal Supreme Court for a ruling entitling them to writs of *habeas corpus* opening the way for substitution of civilian trials. The Court, however, held unanimously (Justice Murphy not participating) that the President had acted within his proper powers and denied the appeal. Attorney-Gen-

(b) *Habeas corpus*

(c) Jury trial

Like indictment by grand jury, trial by petit, or trial, jury passed into American usage with the English common law. The federal constitution provides for it in three different clauses,¹ and no state constitution fails to ordain it. In the federal field, the constitution requires it to be employed in "the trial of all crimes, except in cases of impeachment";² enjoins that trial shall be "speedy," "public," "impartial," and in "the state and district wherein the crime shall have been committed"; and guarantees other safeguards for the accused, such as assistance of counsel. It is, however, by common law that a federal jury must consist of twelve persons and must arrive at its verdict by unanimous vote. It is also by common law that the right of jury trial does not apply to cases in courts of equity, to cases in contempt of court, and to petty offenses, or misdemeanors, punishable only by small fines. Formerly it was supposed that wherever applicable under constitutional provision or common law, jury trial must prevail. The federal Supreme Court has now held, however, that since the device is intended fundamentally for the accused's protection, he may, if he considers it to his interest to do so, waive the right in federal proceedings; and many states allow the same discretion.³

(d) Searches and seizures

Another treasured inheritance from English common law is grounded upon the ancient maxim that every man's house is his castle. "The right of the people," says the Fourth Amendment, "to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated"; and state constitutions commonly echo the guarantee. The language employed suggests that there are searches and seizures which are *reasonable*; and the Fourth Amendment goes on to define them as being such as are conducted in pursuance of warrants (1) issued "upon probable cause, supported by oath or affirmation," and (2) "particularly describing the place to be searched and the persons or things to be seized." The Supreme Court has, however, recognized situations in which the police may legitimately make searches and seizures without a warrant. Thus if it is known or thought probable that a person guilty of a felony or breach of the peace has taken refuge in a certain house, officers of the law may go in after him without waiting for written authority. Likewise, if a search is to be made of a boat, automobile, airplane, or other vehicle which could take advantage of delay in order to move out of the officers' reach, a warrant is held to be unnecessary.⁴

eral Biddle successfully contended that the accused were "invading enemies," with no privilege to petition for the desired writs. See R. E. Cushman, "The Case of the Nazi Saboteurs," *Amer. Polit. Sci. Rev.*, XXXVI, 1082-1091 (Dec., 1942).

¹ Art. III, § 2, cl. 3, and Amendments VI and VII.

² The right is "preserved" also in civil cases in which the value in controversy exceeds twenty dollars (Amendment VII).

³ *Patton v. United States*, 281 U. S. 276 (1930). Cf. J. A. C. Grant, "Felony Trials Without a Jury," *Amer. Polit. Sci. Rev.*, XXV, 980-995 (Nov., 1931).

⁴ For a famous prohibition case in which the Supreme Court sustained the admission of evidence obtained surreptitiously by "wire-tapping," see *Olmstead v. United States*, 277 U. S. 438 (1928). The Federal Communications Act of 1934 forbids any person, without authorization by the sender, to intercept and divulge any com-

Underlying and cementing together the long list of judicial guarantees enumerated is that of "due process of law." The Fifth Amendment to the federal constitution forbids that under the operation of the national government any person shall be "deprived of life, liberty, or property" without due process; and in 1868 the Fourteenth Amendment imposed the same restriction upon the states—a restriction which in point of fact is also laid upon themselves by all of the states in their own constitutions. Operating as a limitation equally upon executive, administrative, legislative, and judicial branches of government on every level, due process has therefore become a paladium of individual and corporate rights as against all governmental authority in the country.

(a) Due
process
of law

Notwithstanding its high significance, the term has never been fully and conclusively defined. Broadly equivalent to the "law of the land" as guaranteed in *Magna Carta* and to the "rule of law" upon which English jurists place great stress today, it has, like those phrases, been subject to steadily broadening and deepening interpretation. Certainly the constitutions do not fix its bounds, and no more do the courts. Efforts to apply it to the multifold actions and relationships of life have given rise to a stupendous amount of litigation and to an unending stream of judicial decisions; more cases have found their way into the courts involving the due process clause than any other provision of the federal constitution. But, though sometimes pressed to do so, the judges have never cared—or dared—to try to frame any complete definition. Rather, they have preferred, as the highest federal tribunal has said, that "the full meaning of the term should be gradually ascertained by the process of inclusion and exclusion in the course of decisions in cases as they arise."¹

The term
nowhere
fully
defined

No other policy would indeed have been feasible, because the endless shadings taken on by the rule as new situations bring it into play would make it impossible to frame a definition that would long have any claim to exactness, and because the interests of justice and social well-being demand that this rule, more than any other, be kept flexible and adaptable. Happily for the courts, due process questions usually come to them in such form as to call for only a negative sort of definition. An individual or a corporation objects to some administrative or legal action on the ground that deprivation or loss has been suffered through due process not being observed; and the thing that the court is called upon to determine is, not the scope of due process in general, but simply

munication; and in *Nardone v. United States*, 302 U. S. 379 (1937) the Court held that the prohibition applies equally to public officers and to private individuals. In a number of later cases, the Court has held evidence obtained by wire-tapping (or its equivalent) admissible, so long as the sender suffers no disadvantage. As recently as 1943, however, the restrictions upon the use against an accused person of evidence secured by questionable methods on the part of law-enforcement officers were tightened by decisions in *Anderson v. United States*, 318 U. S. 350 (1943), and *McNabb v. United States*, 319 U. S. 41 (1943).

* ¹ *Twining v. New Jersey*, 211 U. S. 78 (1908).

whether the action in question was or was not, so far as it went, in accordance with due process. In other words, the courts say that *this* is due process and that the *other* is not, but leave the way open to make further rulings subsequently in either direction.

Due
process
and
proce-
dural
rights

On looking into the ways in which the term has actually been applied, one finds that sometimes it is invoked in defense of rights of a procedural character and at other times in behalf of those that are by nature substantive. In earlier days, it was thought applicable (as in England) to procedural matters only. The Supreme Court so construed it in 1856,¹ and the view stood until the last quarter of the century, when decisions of the same tribunal turned it also to the defense of substantive rights, giving it a scope and importance which it had never before possessed. Quite apart from due process, the rights of a person accused of crime are, as we have seen, rather extensively protected by guarantees such as those of indictment by grand jury, trial by petit jury, and exemption from self-incrimination. Contrary to what might be supposed, due process does not directly confirm or strengthen these particular rights. What it does is rather to require, on even more fundamental lines, that an accused person be given a *fair* trial before a court of proper jurisdiction, with opportunity to confront his accusers and to secure evidence by compulsory process. If in a given circumstance, this means jury trial, due process requires it; if the end can better be attained by some other procedure, due process does not insist upon a jury.² In civil cases, the situation is in principle the same: due process requires merely (but of course this is the nub of the matter) a regular proceeding before a proper court, with a fair hearing for both parties.

Due
process
and sub-
stantive
rights

It was, however, when due process ceased to be a weapon merely against arbitrary and unfair judicial procedure and was turned to the curbing of arbitrary and unfair governmental action of any kind that the rule came into its own. As indicated above, the change occurred during the closing decades of the nineteenth century, in a period during which the states were vigorously meeting new conditions and problems (arising from rapid expansion of their industrial life) with drastic regulation of business, trade, and labor, and when disapproval or downright fear of what was happening gradually swung the courts to the view that the principle of due process might properly be invoked as a norm or test for determining the validity of the acts in question. Under the due process clause of the recently adopted Fourteenth Amendment, the police power of the states came in for rigorous restraint, and

¹ *Murray's Lessee v. Hoboken Land and Improvement Company*, 18 Howard 272.

² In the case of *Powell v. State of Alabama* (287 U. S. 45), the Supreme Court, in 1932, held for the first time that the due process clause guarantees the defendant in a criminal proceeding the right to counsel and an opportunity to prepare for trial. This was the famous *Scottsboro* (Ala.) case, in which the Court reversed a lower tribunal that had convicted and sentenced to death eight Negro youths within a week after their arrest for rape, and notwithstanding that they entirely lacked counsel prepared to defend them.

simultaneously the corresponding clause of the Fifth Amendment was interpreted afresh to enable new restrictions to be placed upon federal power as wielded through legislation by Congress.

For many years now, there have been plenty of due process cases turning on the question of whether a given act of Congress deprives an individual or corporation of life, liberty, or property—freedom of person, liberty of contract, and what not—in a manner to be construed as violating due process. But the principal field in which the rule operates today is that occupied by the police power of the states; in that area, cases and decisions involving applications of it are legion. The matter is complicated by the fact that, just as the courts refuse to attempt any general definition of “due process,” so they find it impracticable to mark out any very definite boundaries for the police power, preferring, rather, to decide when controversy arises whether any given act is to be construed as coming within the scope of that power. Under commonest usage, however, the police power is viewed as including all regulative authority of states and their subdivisions to protect and promote public health, safety, morals, order, convenience, and general welfare; and among the most frequent concrete applications of it are laws on sanitation, on public morals, on the sale of intoxicants, on dangerous or objectionable trades, on zoning and housing, on railways and other common carriers, on hours of labor and minimum wages. When, however, a state undertakes to regulate the rates and services of public utility corporations, or to protect the health of women and children by restricting the number of hours a week that they may lawfully be employed in a factory, or to restrain citizens from making use of their property in ways considered deleterious to public health or morals, it is not unlikely to find itself accused of having deprived individuals or corporations of liberty or property, or both, without due process of law; and, a test case being brought, it falls to the courts to determine whether or not the contention is well founded. Manifestly, great latitude of judgment is open to the judicial authorities in handling cases of this type. Due process is nowhere precisely defined; the same is true of the police power; and the variety of considerations that will have to be taken into account is simply limitless. In consequence, there is the widest latitude for the personal opinions, susceptibilities, and social philosophies of the judges to influence the decisions rendered, and a court today may take a position diametrically opposite to that taken by it at an earlier time. It is not merely a question of settling disputes at law; it is a matter of fixing public policy.

Over the years, the Supreme Court, in passing upon due process cases, has held the states within narrower bounds in exercising their police power than they would have been likely to observe of their own accord. Thus, when the legislature of New York, in 1897, passed an act forbidding employees to work in bake-shops more than sixty hours a week

Due
process
and the
police
power
of the
states

The
Supreme
Court,
the
police
power,
and due
process

or ten hours a day, a "conservative" Court held the provision unconstitutional, on the ground that it was an "unreasonable, unnecessary, and arbitrary interference with the right and liberty of the individual to contract in relation to labor."¹ This "right and liberty," it was considered, had been taken away in violation of due process; although, twelve years later, an Oregon law restricting the hours of labor in manufacturing establishments to ten, and applying to both sexes, was upheld by a Court that had been "liberalized."² Again, when the legislature of Kansas sought to make it a misdemeanor for an employer to threaten to discharge an employee because he was a member of a trade union, the Court pronounced the statute invalid.³ When Arizona undertook to forbid the use (under certain circumstances) of injunctions in connection with labor disputes, that measure also was overthrown.⁴ An Oregon minimum-wage law was sustained in 1917 only by the narrowest possible margin, *i.e.*, a four-to-four division of the court;⁵ and a similar law enacted by Congress for the District of Columbia was declared invalid in 1923.⁶ In 1932, an Oklahoma statute requiring those engaged in the manufacture, sale, and distribution of ice to obtain a state license was overthrown;⁷ although two years later a New York statute undertaking to establish a milk-control board with power to fix prices of milk charged by stores to customers was upheld.⁸ In applying the due process clause to state legislation, the Supreme Court therefore wields a great amount of control over the entire development of industrial and other economic legislation; and dissatisfaction with the generally conservative temper displayed by the judges in exercising their authority was for a time a main impetus to popular demand for curbing the tribunal's powers. Appointment by President Franklin D. Roosevelt of several younger and more liberal justices has, however, begun to bear fruit in a broader construction of the police functions of both nation and states.⁹

¹ *Lochner v. New York*, 198 U. S. 45 (1905).

² *Bunting v. Oregon*, 243 U. S. 426 (1917).

³ *Coppage v. Kansas*, 236 U. S. 1 (1915). Similar laws of fourteen other states were made void by this same decision.

⁴ *Truax v. Corrigan*, 257 U. S. 312 (1921).

⁵ *Stettler v. O'Hara*, 243 U. S. 629 (1917).

⁶ *Adkins v. The Children's Hospital*, 261 U. S. 525 (1923).

⁷ *New State Ice Co. v. Liebman*, 285 U. S. 262 (1932).

⁸ *Nebbia v. New York*, 291 U. S. 502 (1934).

⁹ For a fuller discussion of due process, see J. M. Mathews, *The American Constitutional System* (2nd ed.), Chaps. xxv-xxx, and other works cited on p. 157 below. "Originally," writes Professor E. S. Corwin, "'due process of law' meant simply the modes of procedure which were due at the common law. . . . Today, 'due process of law' means 'reasonable' law, or 'reasonable' procedure, that is to say, what a majority of the Supreme Court find to be reasonable in some or other sense of that extremely elastic term. In other words, it means, in effect, the approval of the Supreme Court; but . . . this approval will sometimes be extended on easier terms than at others." *The Constitution and What It Means Today* (7th ed., Princeton, 1941), 169-170.

Rights of Property

Civil rights extend to the protection of property interests as well as of personal freedom, and in some of the constitutional provisions the two are bracketed together. Due process, for example, applies to deprivation of property no less than to that of life and liberty; so likewise do the guarantees pertaining to interstate citizenship. State constitutions abound in provisions relating mainly or solely to property rights; and the national constitution, leaving the states generally free to say what constitutes property,¹ simply throws around it, as severally defined by them, a further shield of protective stipulations.

Government everywhere has power to take private property from individuals and corporations; otherwise it would have no adequate means of subsistence. As a rule, it takes property (usually in the form of money) by procedures constituting one form or another of taxation. Sometimes, however, it finds itself in need of some particular piece of property, *e.g.*, a plot of ground suitable for a public building, and possesses itself of it—irrespective of whether the owner wants to part with it—by virtue of the right of “*eminent domain*.” A word must be said about civil rights as related to each of these processes.

The taxing power of both nation and states is broad and undefined. In the case of the states, the national constitution forbids laying imposts or duties on imports or exports except as necessary for the execution of inspection laws, and also the laying of tonnage duties; and judicial construction prohibits the taxing of certain (although no longer all) federal instrumentalities.² Otherwise, the states are free, so long as their tax laws and procedures keep within the bounds of due process, equal “*privileges and immunities*” for the citizens of the United States, and other broad requirements already indicated in the present chapter. Taxation by the national government likewise is subject to any and all limitations that may arise from the operation of due process. In addition, it is expressly restricted by constitutional stipulations (1) that no tax may be imposed upon articles exported from any state;³ (2) that all direct taxes (apart from income taxes) shall be apportioned among the several states in accordance with the respective numbers of their inhabitants;⁴ (3) that all indirect taxes, such as customs and excises, shall be uniform—that is, shall fall upon the same kinds and amounts of property with equal weight in all parts of the country;⁵ and (4) that no money may

Limitations upon the power to take private property

1. By taxation

¹ Except that under the Fifteenth Amendment a state may not establish or recognize property in man or man's labor—in other words, legalize slavery or involuntary servitude. It may be added that through its exclusive power to grant patents and copyrights, the national government in effect defines property in inventions and publications.

² See pp. 80-82 above.

³ Art. I, § 9, cl. 5.

⁴ Art. I, § 2, cl. 3.

⁵ Art. I, § 8, cl. 1.

be drawn from the public treasury except in pursuance of "appropriations made by law."¹ Whatever comfort the taxpayer may be able to derive from these restrictions he is clearly entitled to, because his property cannot constitutionally be levied upon in violation of any of them.

2. Under
eminent
domain

The power of eminent domain is one which every government must have. In the absence of constitutional restraints, however, it would be peculiarly liable to abuse: compensation might be altogether inadequate; indeed, it might be denied altogether. Hence, the Fifth Amendment not only forbids private property to be taken by the national government for public use without due process of law, but requires that "just compensation" be rendered; and state constitutions commonly impose the same restrictions (sometimes in a more detailed way) upon state and local governments.² To be sure, the courts have usually interpreted eminent-domain clauses very broadly. For example, they uphold the taking of land not only for purposes which are strictly governmental, *e.g.*, the erection of a court house, but for purposes which have any clear relation to governmental functions, *e.g.*, the creation of a park; and they raise no objection to the exercise of the power by railroads or other corporations to which the government has delegated it, provided that such corporations are engaged in a business "affected with a public interest," provided, too, that the property sought is essential to the corporation's activities, and so long as the same conditions are observed that the government itself would be required to meet.³

What is to be regarded as just compensation in any particular instance is likely to be a matter for judicial or administrative determination. The government or corporation will ordinarily make the owner an offer. This is very likely to be refused. Counter-proposals and mutual concessions may lead to an agreement, as in an ordinary sale. But if they do not, the owner can appeal to the courts, which will fix the amount that he may receive and must accept; or the decision may be reached by commissioners or other administrative boards. All that is necessary to meet the requirements of the constitution is that the dissatisfied seller shall have an opportunity to be heard on the subject and to present such evidence concerning the value of his property as he may desire to bring forward.⁴

¹ Art. I, § 9, cl. 7.

² Even if they fail to do so, the due-process clause of the Fourteenth Amendment is sufficient to impose the obligation of compensation. *Chicago, B. & Q. Ry. Co. v. Chicago*, 166 U. S. 226 (1897).

³ Property deemed necessary for national defense can be conscripted, just as men are conscripted, although of course only in pursuance of law. On a requisitioning act of 1940, see pp. 83-84 below.

⁴ *United States v. Jones*, 109 U. S. 513 (1883). Still another form of protection for private property is the prohibition which rests upon the states—although not upon the national government—to "pass any law impairing the obligation of contracts." This matter, however, has been considered in an earlier chapter (see pp. 83-84 above).

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4. INSTRUMENTALITIES OF POPULAR CONTROL

CHAPTER X

THE PEOPLE AS VOTERS

It has long been a proud boast of Americans that, whatever the situation elsewhere, theirs is a country in which the people rule. Through constitutions freely made and amended, through elections, and by the force of public opinion, an electorate potentially comprising almost ninety-seven per cent of the adult population creates its own governments, endows them with powers, fixes the limits of their authority, chooses lawmakers and other policy-framing officials,¹ and determines the broad objectives and courses of public action.

Popular
govern-
ment
and its
limi-
tations

To be sure, any one having some acquaintance with the nation's political history, and not altogether blind to what goes on around him, knows that, even among us, the democratic process has its limitations. He is aware, for example, that the federal constitution was put into operation without ever being submitted to a popular vote; that amendments to that instrument have commonly been adopted or rejected by state legislatures whose members had been elected with no reference whatever to the changes proposed; that presidential candidates sometimes win with only a minority of the popular ballots; that rarely more than seventy per cent, and sometimes hardly more than fifty per cent, of the qualified electors go to the polls, even when a president is to be chosen; that some of our cities (happily far fewer than in the past) are still dominated by bosses, rings, and "interests"; that the fate of many a significant bill in Congress is determined by seniority traditions governing committee chairmanships, by log-rolling maneuvers, lobbying activities, and legislative by-play over which the voters have at least no direct and immediate control. He knows, in short, that if the people rule, they rule a good deal of the time at rather long range and by decidedly roundabout means and processes.²

Nevertheless, at bottom, the claim is justified. Ours is a government of the people, in the sense that the citizenry is the final authority, with power not only as a matter of law, but in practical fact, to make the government what they want it to be and to compel it, at least eventually, to do what they want it to do. This is equally true whether one is thinking

¹ As well as numerous officials who, not being policy-determining, might better be appointed rather than elected. All told, the people elect the president and vice-president, 531 members of Congress, some 10,000 state legislators and officers, and probably 800,000 officers of counties, cities, and other local areas.

² C. A. Beard, "The Fiction of Majority Rule," *Atlantic Mo.*, CXL, 831-836 (Dec., 1927); J. Dickinson, "Democratic Realities and Democratic Dogma," *Amer. Polit. Sci. Rev.*, XXIV, 283-309 (May, 1930).

of the national government alone or of the governments of the states and their political subdivisions as well; and we shall be better equipped to study these different governments as going concerns if we first bring into view the bases of popular control on which they rest. Three matters, chiefly, call for attention: (1) the composition and characteristics of the electorate, (2) the organization of the electorate in political parties, and (3) the nomination and election of candidates for public office.

Constitutional
basis of
the
suffrage

By the electorate, we mean, of course, those of the people who are entitled to vote. The matter, however, is less simple than it sounds, because under our federal system every one of the forty-eight states has wide latitude to make its own suffrage regulations, or, in other words, to create its own electorate. To be sure, the Fifteenth and Nineteenth Amendments to the federal constitution forbid a state (or the United States) to deny or abridge the "right" of citizens of the United States to vote on account of (a) race, color, or previous condition of servitude, or (b) sex. But to this extent only is the suffrage regulated on a uniform, nation-wide basis. The federal constitution confers the right to vote on no one: it merely stipulates certain grounds on which people otherwise qualified shall not be disfranchised—with the result that the electorate for national purposes becomes simply the aggregate, or sum total, of the more or less differing electorates maintained in the individual states. Any one who can vote for a member of the "most numerous branch" (*i.e.*, the lower house) of his state legislature can vote also for the only members of the national government who obtain their positions by popular election, namely, congressmen, senators, and (in effect) the president and vice-president.¹

The suff-
frage a
privilege,
not a
right

Notwithstanding that the constitutional amendments cited refer to the "right" to vote, the suffrage is to be regarded as not properly a right but rather a privilege. It is, no doubt, a right—a *legal* right—for those who have been endowed with it—so long as they do not disqualify themselves by, for example, committing a crime or going insane. But there is no inherent right to be so endowed. To be sure, people urging an extension of the suffrage in one direction or another have always been prone to picture voting as a natural, if not also a constitutional, right. The argument was heard repeatedly during the long campaign for the enfranchisement of women. A sober view of the matter, however, suggests that, in the last analysis, who may vote and who may not is properly to be determined by considerations of general policy and expediency, and not on the theory that any particular class or classes of the people have an inherent right to be included. Even citizenship, as our courts have declared repeatedly, carries with it no such right.² To be sure, no state

¹ This plan is prescribed for the choice of representatives by Art. I, § 2, cl. 1, of the federal constitution; for that of senators, by the Seventeenth Amendment; and for that of presidential electors (regarded as *state* officers), by state constitutional or statutory provisions.

² *United States v. Anthony*, 24 Fed. Cases, No. 14459; *Miner v. Happersett*, 21 Wallace 162. These decisions were rendered, in 1873 and 1874, in cases in which the question at issue was the right of women as *citizens* to vote.

now allows non-citizens to vote. But children are citizens; and no one proposes that they be made voters.

Historical Development of the Suffrage

The history of the suffrage, particularly in the older states, has been in the main a record of progressive extension of voting privileges to new groups of people—non-property-holders, small taxpayers, ex-slaves, women—although interspersed with extensions have also been contractions arising from the introduction of new tests, especially that of literacy. Originally, voting was confined almost entirely to male property-holders, with occasionally a religious test in addition. The period from 1815 to the Civil War, however, saw property qualification lowered and finally to all intents and purposes abandoned, taxpaying requirements given up in all but a few states, religious tests abolished, and in many states aliens somewhat imprudently allowed to become voters as soon as they declared their intention to be naturalized. Influenced by the "Know-Nothing" movement, Connecticut in 1855 and Massachusetts in 1857 adopted reading and writing tests designed to disqualify the illiterate foreign-born. Nevertheless, by 1860 most states had arrived at what may fairly be termed manhood suffrage for whites.

Disappearance of property and religious qualifications

Since the Civil War, the suffrage has been broadened mainly by the enfranchisement of Negroes and of women. A few Negroes voted in certain Northern states (mainly in New England) before 1860. General enfranchisement of people of color came only, however, as a result of new state constitutions and laws adopted, under pressure from the radical Republican majority in Congress, during the era of Reconstruction; and voting privileges for ex-slaves and their descendants, as indeed for Negroes in every part of the country, were supposed to be guaranteed for all time by the Fifteenth Amendment.

Enfranchisement of Negroes

Demand for the enfranchisement of women was heard as early as the Jacksonian era, and here and there it was pressed rather vigorously during the later stages of the Abolition movement. No legislature or constitutional convention, however, in this period gave serious attention to the petitions presented on the subject; if noticed at all, they evoked only ridicule. After the Civil War, the situation changed. The Negro had been enfranchised; nearly all men were voters; and the advocates of votes for women could no longer be simply laughed out of court. The first notable triumph of the cause was in Wyoming, where in 1869 women were given the privilege of voting for territorial officers on the same terms as men.¹ On being admitted to the Union in 1890, this territory continued its woman suffrage arrangements; and before the close of the century Colorado, Idaho, and Utah also became equal suffrage states. The movement then slackened. But about 1906 it gathered fresh mo-

Enfranchisement of women

¹ Kentucky in 1838 and Kansas in 1861 began permitting women to vote in school elections. Other states gradually took similar action, and in 1887 Kansas conferred full municipal suffrage.

mentum, and in five years (1910-14) the number of equal suffrage states was raised to eleven.¹

Meanwhile the suffragists turned to the larger objective of a general nation-wide enfranchisement. To this end, some urged amendment of the national constitution so as to require a state to submit the question of woman suffrage to its electorate on petition of as few as eight per cent of the voters. Others, feeling that this "states' rights" method was too slow and uncertain, threw their support to the "Susan B. Anthony amendment" (first brought forward in 1869), which proposed to forbid the United States or any state to withhold the ballot on account of sex. The movement finally centered upon the latter plan; and a brief period of sane but determined agitation brought complete success. The Nineteenth Amendment, embodying the Susan B. Anthony proposal, was adopted by Congress in 1919 and ratified by the requisite three-fourths of the states during the next fourteen months. Proclaimed August 26, 1920, it met its first test at the national and state elections of the following November.²

Women's
part in
the politi-
cal life
of the
nation

The women of the entire country—or such of them as possess the necessary age and other qualifications—have thus had the suffrage a full quarter of a century. It would be interesting to know precisely how they have voted during this time, and to what extent they have influenced electoral results. Unfortunately, such information cannot be had; for while an industrious person can get significant information on relative degrees of political interest by counting the numbers of men and women, in any electoral area, whose names appear on the lists of registered voters, and even the numbers of those who present themselves at the polls at a given election, nowhere are the ballots cast by women and by men tabulated separately.³ Such evidence as exists, however, indicates that, by and large, women voters are not very different from men voters. Some are vigilant and intelligent, many are uninformed and apathetic; some make up their own minds, others merely do as a ward leader, a member of their family, or a clergyman, tells them; many go to the polls voluntarily and with scrupulous regularity, many go but seldom and only when pressed to do so, and more still do not go at all.⁴ Suffrage for women is sound

¹ In addition to the four states named, Washington (1910), California (1911), Arizona (1912), Kansas (1912), Oregon (1912), Montana (1914), and Nevada (1914), in Illinois (1913), women were given the right to vote at elections to all offices within the control of the legislature, including most local offices, a few state offices, and the office of presidential elector.

² For good brief accounts of the adoption of the Nineteenth Amendment, see C. B. Swisher, *American Constitutional Development* (Boston, 1943), 691-703, and E. M. Sait, *American Parties and Elections* (3rd ed., New York, 1942), 76-96.

³ An ingenious attempt to study the matter on the basis of a single municipal election (in Portland, Oregon, in 1914) is reported in W. F. Ogburn and I. Goltra, "How Women Vote," *Polit. Sci. Quar.*, XXXIV, 413-433 (Sept., 1919).

⁴ In the presidential election of 1920, women, it is estimated, cast about twenty-five per cent of the total vote (they were enfranchised too late to be registered in some states). In the next five presidential elections, their estimated vote varied between thirty-five and forty-three per cent of the total. During the present war, the country's population, both male and female, has been heavily dislocated, but of course the

in principle, and entirely correct as a matter of policy; but it has not worked, and should never have been expected to work, a revolution.

Participation of women has, however, added some new and interesting features to the political life of the nation. It has almost doubled the electorate and greatly increased the cost of elections. In party conventions, on party committees, and in the rough and tumble of electoral campaigns, women increasingly share almost every form of activity engaged in by men.¹ Laws (particularly relating to social reform) have been enacted, in Congress and especially in state legislatures, that might not have prevailed without the driving influence supplied by women. In addition to appointment to sundry administrative posts, both in the states and at Washington,² women have been elected to high public offices, including two governorships (in Texas in 1924 and 1928 and Wyoming in 1924) and a United States senatorship (in Arkansas) in 1932³—although the rather remote dates mentioned indicate no present trend toward increased service on such levels. Since 1930, from five to nine members of the national House of Representatives have been women (nine were elected in 1944), and the 1940 elections brought a total of 140 women into twenty-nine state legislatures, with the largest quotas in New England. The country is covered with a network of non-partisan state and local leagues of women voters, linked up since 1918 in an active and influential national organization—the National League of Women Voters—all concerned primarily with educating women (and incidentally men also) to vote with intelligence and discrimination, and with securing remedial legislation and other reforms, national, state, and municipal. A National Woman's

male portion far more than the female; and notwithstanding arrangements for soldier voting, the number of women in a position to vote has greatly exceeded that of men so situated. In the congressional elections of 1942, women cast an estimated fifty-three per cent of the ballots. In advance of the presidential election of 1944, some women leaders predicted that the female vote would run as high as sixty per cent of the total. No exact figures will ever be available, but at the date of writing it was agreed that the actual figure was considerably lower—probably not greatly in excess of fifty per cent. Even apart from wartime conditions, however, women of voting age outnumber men—in the approximate proportion (in 1944) of 44,600,000 to 44,000,000.

¹ Since soon after their enfranchisement, women have been represented equally with men in the national committees of the two major parties, and in numerous state and local committees as well. In the Republican national convention of 1944, there were 99 women delegates and 264 women alternates; in the Democratic convention, 174 women delegates and 332 women alternates; and in both conventions women were represented equally with men on the platform and resolutions committee. For a full study of this matter, see M. J. Fisher and B. Whitehead, "Women and National Party Organizations," *Amer. Polit. Sci. Rev.*, XXXVIII, 895-903 (Oct., 1944).

² In 1933, Miss Frances Perkins, of New York, became the first woman to serve as head of one of the ten national executive departments (i.e., Labor), with of course a seat in the cabinet. In the same year, Mrs. Ruth Bryan Owen, as minister to Denmark, became the first woman to be sent as an envoy by the United States to a foreign nation. Several women are serving as chiefs or directors of bureaus in the executive departments at Washington, and a few are members of independent establishments such as the Civil Service Commission. There is also one woman federal circuit judge. On women in the federal civil service, see p. 420 below.

³ Three women have held senatorships for brief periods by virtue of temporary appointment.

party is working for full legal equality of women with men, to be attained through an "equal rights" amendment to the national constitution followed by the requisite federal and state legislation.¹

The Suffrage Today

General
qualifica-
tions:
age,
citizen-
ship,
residence

Looking over the electoral systems of the several states at the present time—under which nearly sixty-five per cent of the total population can qualify to vote, as compared with only six per cent during the Revolutionary period—one notes suffrage qualifications that are found in all states and others that are encountered only here and there. Three that are universal and basic have to do with age, citizenship, and residence.² Until lately, the voting age in this country was uniformly twenty-one; it is still so except in Georgia, where, by constitutional amendment, it was reduced in 1943 to eighteen. The reasons assigned by Georgia's governor for the change in that state include the need of the body politic for the fresh viewpoint of youth and the gain anticipated from young people acquiring active political experience. But transcending these considerations in other people's minds has been the thought that if eighteen-year-olds are mature enough to wear their country's uniform (as well as to teach, to engage in business, and to make contracts), they are mature enough also to be permitted some voice in determining the country's policies. In line mainly with this last-mentioned viewpoint, proposals for lowering the voting age to eighteen made their appearance during 1943 in the legislatures of no fewer than thirty states; and three or four proposed constitutional amendments undertaking to make the plan nationwide attracted some attention in Congress. Interest in the matter may slacken after the war; but in the meantime additional states may take the leap. One argument, among others, sometimes advanced against the

¹ See p. 49 above. Although calling itself a "party," the organization does not put candidates in the field and is really non-partisan. It was the chief proponent of an act of Congress which in 1934 established complete equality of the sexes in matters relating to citizenship (see p. 132 above).

For a sober appraisal of the rôle of women in government and politics, see E. M. Sait, *American Parties and Elections*, 96-106; and cf. the earlier C. C. Catt and N. R. Shuler, *Woman Suffrage and Politics* (2nd ed., New York, 1926). Opposing views are presented in J. G. Ross [pseud.], "Ladies in Politics," *Forum*, XCVI, 209-215 (Nov., 1936), and E. R. Richardson, "Women's Rise to Power," *ibid.*, XCVII, 28-32 (Jan., 1937). Informative pamphlets include L. E. McMillin, *Women in the Federal Service* (3rd ed., U. S. Civil Service Commission, 1941); *Women in the Congress of the U. S.* (Public Affairs Information Service, 1940). Cf. M. J. Fisher and B. Whitehead, "Women and National Party Organization," cited above.

² The requirement that the voter be registered might seem to belong in the list. Registration, however, is not strictly a "qualification," but rather only a means of compiling and maintaining accurate voting lists. See p. 205 below.

Certain categories of people are, of course, almost everywhere debarred, e.g., persons convicted of felony or other crime and inmates of asylums for the feeble-minded and insane; and in various states offenses against the election laws (e.g., bribery), malfeasance in office, and vagrancy or dependence on poor relief are further grounds for debarment. The Council of State Governments is authority for the assertion that, in one state or another, the privilege of voting can be denied for "any one of fifty or more reasons," with an average of six or seven per state. A foolish demand from some conservative quarters during the worst years of the depression, that all persons on relief be debarred—on a nation-wide basis—did not prevail.

plan is that among people already enfranchised, the age group most guilty of neglecting to vote is that between twenty-one and thirty. There are, indeed, those who would raise rather than lower the prevailing requirement, on the ground that society and government have grown so complex that voters need a still greater degree of maturity.¹

Since Arkansas fell into line in 1926, citizenship is everywhere a prerequisite for voting, even though as a result of the uncertainties sometimes surrounding that status, a good many non-citizens actually contrive to visit the polls. The commonest requirement relating to residence is that the voter shall have lived in the state at least one year, some stipulated portion of which (frequently three or six months) must have been spent in the county, and some briefer portion (sometimes not more than ten days) in the precinct in which one's ballot is to be cast.² No one may vote in a given election in more than one place; and this place must be the voter's legal residence, however little of his time he may actually spend there.

Taxpaying—once a widely prevalent qualification—has been generally discarded as such except in the Southern states, where payment of a poll tax of one or two dollars annually, and by a specified date, is required in seven states,³ partly in aid of school or other special funds, but also with a view to keeping down the Negro and "poor white" vote.⁴ In six additional states, some kind of tax qualification applies to persons who vote on bond issues or special assessments, but not to voters in general elections.⁵

In earlier times, educational, or "literacy," qualifications were uncommon. Today, however, they are in use, in some form, in twenty states (including six in the deep South and three in New England), and are authorized by constitutional provision in three others where the legislature has not yet seen fit to introduce them.⁶ Indeed, educational quali-

Special
qualifica-
tions:
1. Pay-
ment of
taxes

2. Liter-
acy

¹ "Should the Legal Voting Age Be Reduced to Eighteen Years? Pro and Con" [Symposium], *Cong. Digest*, XXIII, 193-222 (Aug.-Sept., 1944).

² For a complete tabular view of residence requirements, see *State Government*, XIII, inside back cover (Oct., 1940); also W. B. Graves, *American State Government* (rev. ed., New York, 1941), 115. The "model state constitution" recommended by the National Municipal League provides for residence in the state for at least one year preceding the election, in the county for the last ninety days of the period, and in the election district for the last thirty days. At all elections, residence requirements operate to bar many people from the polls, especially non-home-owners moving about in quest of work. But they are necessary as safeguards against the importation of "floaters" into districts to turn the electoral tide.

³ Alabama, Arkansas, Mississippi, South Carolina, Tennessee, Texas, and Virginia. Early in 1943, the legislature of Tennessee repealed the half-century-old poll-tax law of that state, but a few months later the state supreme court held the act unconstitutional. Georgia was in the list of Southern poll-tax states until February, 1945.

⁴ This matter is considered further below (pp. 171-172).

⁵ In Alabama, however, a voter's property must be free of tax delinquency if he is to vote in a presidential election, unless he can qualify under an alternative literacy provision; all property taxes must have been paid in Mississippi; and ownership of property is an alternative to literacy in Rhode Island and South Carolina.

⁶ In about a dozen additional states, there is an indirect literacy test in the sense that no provision is made for assistance to illiterates in casting ballots. Most of the twenty states referred to make literacy an absolute qualification, but in some (mainly in the South) it is insisted upon only if some property or other alternative qualification cannot be met.

fications may be said, broadly, to have succeeded to the position once held by property qualifications, although, popular education having attained its present level, they operate to debar a far smaller proportion of the people. In some states, the test is confined to ability to read in English (commonly a few lines of the national or state constitution); in others, it covers also ability to write. Applied usually at the time of registration, the test may be abused by ignorant and scheming registration officials; and a far better arrangement is one introduced in New York (in pursuance of a constitutional amendment adopted in 1921) under which reading and writing tests for first voters—planned by a group of educational psychologists to approximate the attainments of a sixth grade pupil in the public schools—are prepared and administered every year, not by registration or election officials, but by the state educational department.¹ Assuming honest administration, there is much to be said for the principle of the literacy test. The electorate having now been expanded almost as far as possible, the next step would seem to be to “trim it at the edges” by eliminating the least fit. Ascertainment that a citizen can read and write no more guarantees that he will always vote wisely than testing an applicant for an automobile driver’s license insures that he will invariably manage his car with safety for himself and others. But it is as effective a means as we have of debarring people who, by and large, are most likely to be unfit. And while at first glance the plan might seem undemocratic, and consequently out of harmony with American principles, the fact that all of the states now make it possible for practically any man or woman, even of low intelligence, to receive an elementary education without cost—in evening schools, if in no other way—relieves it from any such opprobrium. The road to the ballot-box may very appropriately lead through the school-house.²

¹ Only those first voters are required to submit themselves to examination who cannot present as proof of literacy a certificate showing completion of the sixth grade in a school (or second year in an evening school) in which English is the language of instruction. For all purposes of the law, “literacy” means ability to read simple English and interpret what is read. The introduction of the literacy test greatly stimulated the interest of the foreign-born in evening-school instruction. Women are slower to submit themselves to the test than are men, but are more successful in passing it.

² F. G. Crawford, “The New York State Literacy Test,” *Amer. Polit. Sci. Rev.*, XVII, 260-263 (May, 1923), XIX, 788-790 (Nov., 1925), and XXV, 342-345 (May, 1931); A. W. Bromage, “Literacy and the Electorate,” *ibid.*, XXIV, 946-962 (Nov., 1930); W. B. Munro, “Intelligence Tests for Voters,” *Forum*, LXXX, 823-830 (Dec., 1928). Variations of definition are responsible for widely differing estimates of the total number of illiterates in the United States. But the census of 1940 showed that out of a total of 74,775,836 persons twenty-five years of age or over, 10,104,612 had not gone beyond the fourth grade, 2,799,923 never having attended school at all. Of the larger number mentioned, 4,200,000 were native-born whites, 3,100,000 foreign-born whites, and 2,700,000 Negroes. New York, with 1,020,197, had the largest total. During the first year’s operation of the Selective Service Act of 1940, a quarter of a million men otherwise fit for active service were rejected because of lacking the necessary literacy or mentality.

Special Suffrage Problems in the Southern States

One large section of the country—the South—has a suffrage situation all its own; and the confused and difficult conditions existing there call for special attention.¹

At the close of the Civil War, the Southern states were compelled to give the freedmen the ballot as a condition of being restored to their previous position in the Union, and the Fifteenth Amendment sought to perpetuate the arrangement by prescribing that the right of citizens to vote should not be "denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude." Unhappy results followed, especially where control of legislatures by inexperienced and gullible Negroes, abetted by Southern "scalawags" and Northern "carpet-baggers," brought on an orgy of financial extravagance and foolish legislation; and it is not to be wondered at that, once the white populations regained the upper hand, they began looking for ways in which the Negro could be quietly but effectively deprived of political power. The main hurdle to be surmounted was, of course, the Fifteenth Amendment; so long as it stood (and there was not the slightest chance of securing repeal of it), no Negro could, *simply as a Negro*, be kept from the polls.

The search for an effective method of disfranchisement

Negroes, however, were commonly illiterate, and also poor; and this opened a way out of the dilemma. In 1890, Mississippi set the pace for her sister states by writing into her constitution clauses under which, in order to vote, one not only must have lived two years in the state and one year in the election district, but must have paid all taxes assessed against him (including a poll tax of two dollars), and must be able either to read any section of the state constitution or to understand it when read to him and to give a reasonable interpretation of it. The results were, in general, those desired. The exceptionally lengthy period of residence barred large numbers of Negroes who habitually shifted from plantation to plantation. Even if a colored man succeeded in paying his poll tax on time (and it was artfully required to be paid a year in advance of the election), he was likely to be careless enough to be unable to produce his tax receipt when called for. Few Mississippi Negroes could read, and still fewer could give an interpretation of a perhaps craftily selected passage from the state constitution likely to be accepted as "reasonable" by a white official with a strong predisposition against Negro voting. If, too, in replying to detailed personal questions a candidate for registration was detected deviating an iota from the truth, he became guilty of perjury, for which also he could be disfranchised. Although every one knew that the primary purpose of the regulations

The Mississippi plan

¹ A new, exhaustive, and wholly admirable treatise on the subject may be mentioned at the outset, i.e., G. Myrdal, *An American Dilemma; The Negro Problem and Modern Democracy* (2 vols., New York, 1944). Political aspects are dealt with more particularly in Vol I, Chaps. xx-xxiii.

was to keep the Negro from the polls, not a word was said in them about "race, color, or previous condition"; and when the federal Supreme Court passed upon them in a test case, it was unable to find that they in any manner violated the Fifteenth Amendment.¹ Clauses of similar purport accordingly found their way into the constitutions of most other Southern states.

"Grandfather clauses"

There was, however, one drawback: while a secondary object of the tests was in some instances to curb the effects of radical (chiefly Populist) inclinations among poor whites, the restrictions operated to debar too large a proportion of whites along with the Negroes. But for this, also, a remedy was found—in the famous "grandfather clauses" adopted at one time or another, as constitutional amendments, in no fewer than seven states. South Carolina led off in 1895 by exempting for three years from her literacy test all men, otherwise qualified, who were voters, or lineal descendants of persons who were voters, on January 1, 1867. The first act of Congress forbidding disfranchisement of Negroes in the Southern states became law on March 2 of the year mentioned. No Negro, therefore, could avail himself of the new provision. But the poorest and most illiterate white could do so—commonly because of being the son or grandson of a voter of the earlier date. The devices employed in other states differed in details, but the object was always the same, *i.e.*, to open a way for whites to get on the voters' lists without letting down the bars for Negroes of similar condition. In all cases, the clauses were only temporary. Having served their purpose, all have long since disappeared. The last to go, *i.e.*, one incorporated in the constitution of Oklahoma by popular initiative and referendum in 1910, differed from the others in being without limitation of time, but was overthrown by the Supreme Court on the ground of incompatibility with the Fifteenth Amendment.² Contrary to common impression, the grandfather clauses did not disfranchise Negroes. That object had already been largely attained by specially contrived literacy, tax, residence, and other requirements under which, as they stand today, in some states hardly one Negro in a hundred ever casts a ballot, and perhaps not more than ten per cent of the adult black population of the entire South is on the registration lists.³ Thou-

¹ *Williams v. Mississippi*, 170 U. S. 213 (1898).

² *Gunn v. United States*, 238 U. S. 347 (1915). The Oklahoma legislature followed up this decision with a statute of 1916 requiring electoral registrars to enroll as voters only persons who were voters in 1914 (when few, if any, Negroes were such); together with such others as should apply for registration during a specified twelve-day period; but, on the ground that the registration period was inadequate and the measure as a whole designed to perpetuate the old discriminations, the federal Supreme Court eventually nullified the effort, in *Lane v. Wilson*, 307 U. S. 268 (1938).

³ As shown by Professor Paul Lewinson, in his *Race, Class, and Party* (New York, 1932), the proportion of colored voters in such border states as West Virginia, Kentucky, Tennessee, and Arkansas is relatively high, but in the states of the Solid South extremely low. Large numbers of Negroes, it may be added, have been enfranchised in later years as a result of migration to Northern cities; and outside of the South Negro voting is distinctly encouraged, all parties seeking to turn it to their advantage, especially in states like New Jersey, Pennsylvania, Ohio, Illinois, and

sands of Southern whites, however, became voters only by virtue of being gathered into the electorate on the strength of their grandfathers' political status; and this is the end which the "grandfather clauses" were mainly intended to serve.

Later days have brought to the fore two issues that have stirred much controversy and are still unsettled. One is that of the future of the "white primary"; the other, that of abolishing the poll-tax qualification. In most Southern states, the Democratic party is so dominant that nomination in a Democratic primary is equivalent to election—which means that if Negroes are to be deprived of political power, it is even more important to keep them from voting in primaries than in the later elections. And in as many as eight states, the majority party has procured the enactment of "white primary" laws with this object in view, the method being the apparently innocent one of simply giving each party the right to prescribe for voting in its primaries qualifications additional to any laid down in the state constitution and statutes,¹ nothing being said about Negroes, but the expectation being that the added qualifications will, in the case of the majority party, be found to be possessed only by white Democrats. One state, *i.e.*, Texas, tried to go farther by placing on its statute-book, in 1923, a measure stipulating that in no event should a Negro be eligible to participate in a Democratic party primary held in the state. This bold statutory provision—expressly excluding Negroes *as such*—was promptly challenged, and for more than two decades issues relating to the matter have been intermittently before the courts. First, the federal Supreme Court, reversing a district court, unanimously held the 1923 statute unconstitutional as being in conflict with the clause of the Fourteenth Amendment which guarantees the equal protection of the laws.² Next, the Court, in a close vote, and on the same ground, banned a substitute measure giving the state executive committee of every political party in Texas the power to prescribe qualifications of party membership, and consequently for participating in party primaries.³ Persistence, however, sometimes meets its reward; and in the present instance, when the Texas Democrats, giving up as a bad job the effort to attain their ends by state legislation, fell back, in 1932, upon the expedient of a "white primary" rule adopted by their state convention, the Court gave its unanimous approval—on the ground that the convention is the highest authority (as the executive committee is not) of a party,

1. The question of the "white primary"

The earlier experience of Texas

Missouri where the white vote is close. Indeed, in some Northern cities more Negroes vote, in proportion to their numbers, than whites. A complete list of suffrage qualifications in effect in the Southern states a decade or more ago will be found in Lewinson, *op. cit.*, 222-245.

¹ It should be noted that two states outside of the South, *i.e.*, Delaware and Idaho, have also done this.

² *Nixon v. Herndon*, 273 U. S. 536 (1927). The Fourteenth Amendment, said the Court, offered so simple and obvious a basis for a decision that there was no need to consider the bearing of the Fifteenth Amendment upon the case. The plaintiff, Nixon, was an educated Negro physician of El Paso.

³ *Nixon v. Condon*, 286 U. S. 73 (1932).

which, after all, is a voluntary organization competent to determine its own membership.¹ And on this basis the matter seemed settled.

Congress held to have power to control nominations

In a few years, however, so optimistic a conclusion was completely shattered. To begin with, there arose, in 1940, a case in which an election commissioner in a Louisiana congressional district was charged with altering and falsely counting ballots cast in a congressional primary, and when it reached the federal Supreme Court, that tribunal startled the country (and doubtless the defendant) by ruling not only that the commissioner had been properly indicted, but that Congress has authority, if it chooses, to protect the right to participate not only in congressional elections, but in congressional primaries as well.² The decision was startling for the reason that ever since the Supreme Court had seemed so to hold in 1921,³ Congress had been supposed to have no authority to deal with *nominations*, but only with elections. The two houses have as yet not seen fit to exercise their new found power; but, manifestly, if they were to do so, the entire "white primary" system, in all of the states where it exists, would be in jeopardy.⁴

A new Texas case further weakens the "white primary"

But more was to follow. For in another surprise move, in April, 1944, the federal Supreme Court squarely reversed its position of nine years earlier by holding, eight to one, in a case of precisely identical nature, that, notwithstanding all laws and party rules to the contrary, Negroes were entitled to vote in Democratic primaries in Texas.⁴ Under the Fifteenth Amendment, now said the Court, citizens are guaranteed the right to take part in choosing elective officials without restriction by any state on account of race; a state law which, without itself imposing restriction, intentionally opens the way for a private organization, *i.e.*, a political party, to do so, has the effect of making the action of such organization the action of the state itself; and in failing to perceive and assert this in the 1935 decision, the Court had simply been "in error." Naturally, the new turn of events⁵ stirred reverberations not only in Texas, but

¹ *Grovey v. Townsend*, 295 U. S. 45 (1935). Excluding Negroes from primaries was regarded as merely tantamount to denying them party membership. See O. D. Weeks, "The Texas Direct Primary System," *Southwestern Soc. Sci. Quar.*, XIII, 1-26 (Sept., 1932), and "The White Primary," *Miss. Law Jour.*, VIII, 133-153 (Dec., 1935).

² *United States v. Classic*, 313 U. S. 299 (1941). The electoral process, said the Court, is essentially unitary; a congressional primary held at state expense, and therefore acknowledged as having a *public* character, is an integral part of it, and as such subject to the federal control to which congressional elections have always been at least potentially subject.

³ *Newberry v. United States*, 256 U. S. 232. For the circumstances of this case, see p. 262, note 2, below. Four of the justices thought Congress had power to regulate primaries; four thought otherwise; the ninth, non-committal on this point, tipped the scale in the defendant's favor on an entirely different consideration.

⁴ *Smith v. Allwright*, 321 U. S. 649 (1944). The case arose when Smith, a Negro resident of Houston, Texas, sued for damages after being refused a ballot in the primary of July 27, 1940, for the nomination of Democratic candidates for Congress and for state offices. In conformity with *Grovey v. Townsend* (1935), the lower federal courts simply dismissed the claim. See R. E. Cushman, "The Texas 'White Primary' Case—*Smith v. Allwright*," *Cornell Law Quar.*, XXX, 66-76 (Sept., 1944).

⁵ On the whole, however, expected by students of constitutional law after the basic decision in the *Classic* case in 1941.

(the Court's ruling obviously being of wider application) throughout the South; and with the justices a month later refusing to reconsider their action, the search began for ways and means of preventing the decision from having its intended consequences.¹ Even people who thoroughly endorsed the decision's purport could see some point to the sarcastic condemnation of it by the single Supreme Court justice (Roberts) who refused to concur in it, to the effect that it tended to bring the Court's adjudications "into the same class as a restricted railroad ticket, good for this day and train only."

The new "white primary" ruling came at a time when feeling was running high over still another effort to frustrate Southern debarment of Negroes from voting. As indicated above, seven Southern states make the payment of an annual poll tax a qualification for the exercise of the suffrage. To be sure, the chronology of the adoption of poll-tax requirements² rightly suggests that the restriction was originally motivated to no small degree by a desire to curb the electoral consequences of the spread of Populism among whites³ of low economic status, this chapter of suffrage history starting, not back in the Reconstruction period, but a full generation later. Negro voting, however, was aimed at also, and has always been considerably affected by the requirement mentioned, along with others. Politicians and political machines interested in limiting the size of the electorate to be controlled have relied heavily upon it; and plenty of times it has lent itself to political corruption, principally by enabling blocks of poll-tax receipts to be bought up for distribution among people whose votes could in that way be corralled. Four states, indeed—North Carolina in 1920, Louisiana in 1934, Florida in 1937, and Georgia in 1945—have abolished it outright.³

2. The problem of the poll tax

Growing opposition to the tax when employed as an abridgement of voting led to several attempts to have it outlawed by judicial action. The Supreme Court, however, refused to be persuaded that use of the tax in the manner indicated was ever more than incidental to the main object of raising revenue;⁴ and eventually the attack shifted to Congress, where of late it has precipitated bitter controversy. When enacting a measure in the autumn of 1942 to facilitate absent voting by men

¹ In Georgia, for example, the Democratic state executive committee reaffirmed the exclusion of Negroes from Democratic primaries, arguing that at all events the classic decision, relating to Louisiana primaries regulated by statutes, was not applicable to Georgia, where primaries are regulated only by party rules. In any case, remarked a local editor, the Court's latest view will prove meaningless as long as the registration boards can ask a prospective voter to recite the Declaration of Independence and then throw him out for omitting the commas. It may be added that in Texas considerable numbers of Negroes participated in the primaries held three months after the *Allwright* decision.

² Florida (1889), Mississippi and Tennessee (1890), Arkansas (1892), South Carolina (1895), Louisiana (1898), North Carolina (1900), Alabama and Virginia (1901), Texas (1902), and Georgia (1908).

³ A state abandoning the tax as a qualification for voting may, of course (as did North Carolina), continue it for purposes of revenue.

⁴ In *Grovey v. Townsend* (1935), the Court, indeed, unanimously sustained the constitutionality of the tax, whether with or without the suffrage feature.

and women in the armed services and their auxiliaries, Congress went so far as to write into it a clause forbidding any such persons, for the duration of the war, to be deprived of their votes because of having failed to pay any poll tax; and the House of Representatives not only gave its support to this provision, but called up and passed a bill which its Southern-dominated judiciary committee had long sought to suppress outlawing all poll-tax requirements for voting for federal office. Southern filibustering tactics kept this latter measure from reaching a vote in the Senate, and the same thing happened to a similar bill passed by the House in the following year. Again, in 1944, an effort was made, but with no more success; and when these pages went to press, the lines were drawn for a resumption of the fight in 1945. Those who favor the legislation contend not only that the tax is contrary to the spirit of American institutions, but that Congress has full power to fix the qualifications for voting for federal office, or, if not that, at least power to prevent fraud in federal elections.¹ For purposes of public discussion, Southern opponents place most stress upon constitutional considerations associated with states' rights. Every one understands, however, that the actual objective is the maintenance of "white supremacy."²

Merits
of the
Southern
policy

For some decades after the Civil War, the suffrage policies of the South stirred lively discussion and protest in other sections of the country. Eventually, as it came to be realized that Southerners of all parties looked upon the restrictive system as politically and socially indispensable, and that—with of course individual exceptions—the disfranchised were not greatly concerned about political rights, Northern disapprobation declined; in 1912, the Republican party significantly stopped putting in its national platform the time-honored denunciations on the subject. The issue, however, was always smouldering, with developments like the poll-tax controversy capable of fanning it to a flame; and in 1944 the Republican party returned to it with a platform plank declaring for "immediate submission" of a constitutional amendment making it illegal to impose a poll-tax qualification for participation in federal elections—an amendment, of course, in line with one which the Republicans were currently sponsoring in the Senate. The ultimate outcome of the anti-poll-tax drive and of the Supreme Court's new attitude on the white

¹ In the case of *United States v. Saylor et al.*, 322 U. S. 385 (1944), the Supreme Court held that "stuffing ballot-boxes, even in the absence of any federal legislation touching the matter, is a federal crime.

² A realistic study of the problem will be found in D. S. Strong, "The Poll Tax—The Case of Texas," *Amer. Polit. Sci. Rev.*, XXXVIII, 693-709 (Aug., 1944), with which may be compared O. M. Dickerson, "The Poll Tax and Negro Suffrage in Texas," *Soc. Education*, VIII, 302-306 (Nov., 1944). Most of the voluminous literature on the subject is propagandist, but mention may be made of F. P. Graham *et al.*, *The Poll Tax* (Washington, 1940); J. Perry, *Democracy Begins at Home; The Tennessee Fight on the Poll Tax* (Philadelphia, 1944). Not only bills on the subject, but constitutional amendments as well, have been introduced in Congress, one such, brought forward in 1944, as indicated above, being sponsored by substantially the entire Republican membership of the Senate. The subject, of course, has been considered throughout in a strongly partisan atmosphere.

primary cannot as yet be foreseen, and meanwhile one may say simply that the restrictive regulations still prevailing—particularly as administered by sometimes prejudiced and incompetent registration and election officials—are indisputably objectionable in so far as they set up discriminations based on considerations of race and deliberately evade the fundamental law of the country. Moreover, Negro education has now advanced to a point such that some of the Southern states might well adopt a more generous attitude, as indeed one or two of them (notably North Carolina) have done. Many Southern Negroes, however, are still poorly qualified for political power; many of them manifest no desire to vote, considering rather that “politics is white folks’ business”; and with people of color numerically rivaling the white populations in a number of states, the latter can be depended upon to give up only slowly and grudgingly the idea that their security depends upon maintaining some sort of restrictionist policy. A generation that attaches increasing importance to literacy as a qualification for voting can hardly repress the conviction that the initial mistake relating to the Southern Negro was made when the freedmen were enfranchised *en masse* three quarters of a century ago.¹

With a view to penalizing states restricting the suffrage, the Fourteenth Amendment provides that if a state denies or abridges the right of any of its male inhabitants, being twenty-one years of age and citizens of the United States, to vote, “except for participation in rebellion, or other crime,” the basis of representation in such state shall be reduced in the proportion which the number of unenfranchised male citizens bears to the whole number of male citizens twenty-one years of age in the state. Attempt has been made to show that this provision is relevant or pertinent only in cases of denial of the suffrage because of race or color. But the phraseology of the amendment admits of no such interpretation: New York is quite as liable to a reduction of its quota of representatives in Congress because of its literacy test as is Alabama on account of its restrictions aimed at the Negro. In point of fact, this provision—although in form and tone no less mandatory than any other part of the constitu-

Penalty
for denial
of fran-
chise not
enforced

¹ A weighty factor in the perpetuation of Negro disfranchisement in the South is the prevalence of the one-party system in that section. If there were two evenly balanced parties, each would covet the benefit of the Negro vote (as they now do in the North), and fairly rapid relaxation of the existing restrictions might be expected.

The best general studies of suffrage and politics in the South are those of G. Myrdal and P. Lewinson, cited above; and the constitutional and legal aspects are presented admirably in C. S. Mangum, *The Legal Status of the Negro* (Chapel Hill, 1910), Chap. xviii. An excellent briefer discussion is E. M. Salt, *American Parties and Elections* (3rd ed.), Chap. iii. The traditional Southern white viewpoint is presented in E. G. Murphy, *Problems of the Present South* (New York, 1904), Chap. vi, and F. G. Caffey, “Suffrage Limitations at the South,” *Polit. Sci. Quar.*, XX, 53-67 (Mar., 1905). Cf. J. C. Rose, “Negro Suffrage; The Constitutional Point of View,” *Amer. Polit. Sci. Rev.*, I, 17-43 (Nov., 1906); A. H. Stone, *Studies in the American Race Problem* (New York, 1908); W. F. Nowlin, *The Negro in American Politics Since 1868* (Boston, 1931); S. D. Smith, *The Negro in Congress, 1807-1901* (Chapel Hill, 1940); R. W. Logan, *The Attitude of the Southern White Press Toward Negro Suffrage, 1932-1940* (Washington, 1940).

tion—has never been enforced, and probably never will be. Largely because of Negro disfranchisement, the average number of voters in the South who elect a representative to Congress is very much smaller than the average number in other parts of the country, and there has been a good deal of complaint, mainly from Northern Republicans. Any attempt to enforce the constitutional penalty would, however, raise embarrassing questions and precipitate political controversies that most people prefer to avoid. Consequently, every one of the many bills on the subject that have appeared in Congress has fallen by the wayside.¹

The Electorate's Tasks—The Problem of Non-Voting

Numbers
of elec-
tive
officers

Such are the complex and devious lines on which our country determines who shall have the political power that goes with voting. What is there for the electorate as thus defined to do? From state to state, there is much variation. In every state except Delaware, a new constitution or constitutional amendment must be submitted to a popular vote. In twenty-two states, the voters may veto measures that have passed the legislature, and in twenty they may also directly initiate laws.² In all states, they elect the members of both branches of the legislature,³ the governor and varying numbers of other state officials (including many judges), and widely differing—but usually extensive—lists of county, city, town, and other local officers and boards. By discussion, petition, criticism, and other more or less indirect means, they help the policy-framing authorities discover the public will and carry it out. In the domain of the national government, their tasks are fewer. They agitate for or oppose constitutional amendments,⁴ but do not directly vote upon them.⁵ There is no national initiative or referendum for ordinary laws. Aside from formulating and expressing opinion, the voters, indeed, merely elect officers. And the number that they elect is not large, i.e., only the president and vice-president and the members of Congress. No administrative subordinates, and no members of the judiciary, are elective. So far as the national government is concerned, any given elector, therefore, votes only for (1) a set of presidential electors in his state—virtually, of course, for president and vice-president, (2) the two senators of his state, and (3) a representative of his district in the House of Representatives, together with one or more congressmen-at-large if his state, at any given time, is entitled to such⁶—actually and normally, a

¹ Such a measure was defeated in a strongly Republican House of Representatives in 1921 by a vote of 285 to 46.

² See pp. 757-766, in complete edition of this book.

³ Except in Nebraska, where there is only one house.

⁴ See p. 51 above for proposals to apply the initiative and referendum to amendments.

⁵ See p. 253, note 3, below. One may perhaps add the election of delegates to conventions in the states to act on amendments to the federal constitution—a procedure actually employed for the first time in 1933 in connection with the repeal of the Eighteenth Amendment. Such conventions, however, are, like the legislatures themselves, instrumentalities of the states and not of the nation.

total of five officers only. In the national government, we obviously have—and have had from the beginning—a “short ballot,” whatever must be said to the contrary in the case of the state and local governments,

How generally do those of our people to whom it falls, as voters, to supply the popular control which our system of government contemplates live up to their responsibilities? Thereby hangs a somewhat dismal tale. The census of 1920 showed the total population of the continental United States to be 105,710,620. Of this great body of people, somewhat more than 54,000,000 were citizens twenty-one years of age or over. Of this latter number, many (no one knows precisely how many) were, of course, ineligible to vote, because of inability to meet the qualifications imposed in their respective states. When, however, it is noted that in the presidential election that year only a little over 26,500,000 men and women voted for any candidate for the highest office in the land, we come upon one of the most surprising, and many people would say one of the most discreditable, aspects of our political life. Many of the non-voters had failed to register; many who registered neglected to go to the polls; many who went to the polls voted only for certain offices and not for all. In 1924—notwithstanding unusual effort to “get out the vote”—the proportion was almost exactly the same as four years previously. On the other hand, the exceptionally spirited Hoover-Smith campaign of 1928 yielded a popular vote for president of over 36,500,000, out of a total electoral registration of slightly more than 43,000,000; the almost equally lively Hoover-Roosevelt campaign of 1932 brought out a vote of 39,816,522, out of a registration of some 47,500,000; the reasonably vigorous Roosevelt-Landon campaign of 1936 brought out a vote of 45,647,117, out of a registration of nearly 55,500,000; and the heated Roosevelt-Willkie contest of 1940, with third-term and New Deal issues dominant, yielded a record-breaking vote of 49,815,312, out of a registration of 60,576,979. On the last-mentioned occasion, the number of potential voters (*i.e.*, citizens twenty-one years of age and over) outside of the District of Columbia was estimated by the Census Bureau at 79,863,451. While, therefore, the figure representing the total vote appears impressive, fully a quarter of the adult men and women of the country failed to register,¹ and of those who registered, one out of every six neglected to go to the polls. With about eleven million men and considerable numbers of women in the armed services (millions of them overseas),² and with the country's population further dislocated by the exigencies of war industry, the election of 1944 was held under such abnormal conditions as not to be statistically comparable with preceding ones. The civilian vote, however—stimulated by an unusual get-out-the-vote effort

Non-voting

¹ Many, of course, were ineligible to do so, because of lack of the prescribed voting qualifications.

² Some two million of these, however, were not of voting age.

—proved heavier than expected, and the same was true of the soldier vote, with a resulting total of 48,025,684.¹

Causes

The reasons for so great an amount of non-voting in the United States are many. To begin with, no elections are held in the District of Columbia, and more than a quarter of a million men and women are kept from the polls because they have no legal residence outside of that area. Large numbers at every election, especially in the cities, are debarred because of not having resided long enough in the state, county, or election precinct. Ten or more Southern states to all intents and purposes have but one party, and because of the lack of genuine contests, together with the disfranchisement of most Negroes, yield an exceedingly small vote; in South Carolina in 1936, only about fourteen per cent of the potential electorate exercised the suffrage, and in a block of eight Southern states (all having the poll-tax qualification) the average was hardly above twenty-one per cent. Many voters in all parts of the country are prevented from casting their ballots by bad weather, illness, or other legitimate reasons; although it should be noted that, even before World War II prompted extensive new arrangements for voting in the armed services, all but three states had laws largely removing one serious obstacle of earlier days, i.e., absence from the voting precinct.² To some extent, voters are discouraged or thwarted by legal and administrative obstacles—too great crowding at the polls, too short hours for voting, too much red-tape in absent voting, and of course, non-registration. To some extent, they are deterred by the lack of vital issues in an election, by belief that their vote would not affect the result, by fear that employers or others will find out how they voted, by disgust with politics and parties, or even by contempt for political methods of action in general. An obstacle, too, is the "jungle ballot" with which the voter is too often confronted—crowded with names of candidates he never heard of, seeking offices he knows nothing about. After all allowances are made, however, one is tempted to surmise that the most common cause is no one of these things, but simply indifference and inertia; and an extensive first-hand study of non-voting in the city of Chicago, based on the local municipal election of 1923, bears out this opinion.³ Sometimes there is indifference

¹ In the same election, the total vote for members of the national House of Representatives was 45,103,023.

The most trustworthy computations for American elections during the period 1856-1920 will be found in A. M. Schlesinger and E. M. Erickson, "The Vanishing Voter," *New Republic*, XL, 162-167 (Oct. 15, 1921). Figures differing appreciably from those given in this article will be found in many places, but are likely to be erroneous because of insufficient allowance for ineligible. It must be noted, too, that non-voting usually runs decidedly higher when only state and local officers are to be voted for.

² On absent voting, especially as affected by the war, see pp. 207-208 below.

³ C. E. Merriam and H. F. Gosnell, *Non-Voting; Causes and Methods of Control* (Chicago, 1924), Chap. VII. Cf. B. A. Ameson, "Non-Voting in a Typical Ohio Community," *Amer. Polit. Sci. Rev.*, XIX, 816-825 (Nov., 1925); C. H. Titus, *Voting Behavior in the United States* (Berkeley, 1935), with particular reference to California; J. K. Pollock, *Voting Behavior; A Case Study* (Ann Arbor, Mich., 1940),

toward a particular election only. But more often it extends to elections generally; and the Chicago investigation shows it to be especially prevalent among younger voters, in poorer neighborhoods, and among housewives, but only slightly more so among people of foreign than among those of native birth.

Whatever the factors involved, the stay-at-home vote is still of such proportions as to attract a good deal of attention. Every important election brings a fresh round of remorseful and hortatory discussion of the subject; some people go so far as to say that democracy has failed. Two main considerations, however, are always to be borne in mind. The first is that, contrary to a very common assumption, there is no particular virtue in mere numbers of votes. Most get-out-the-vote efforts begin and end in an attempt to induce men and women to go to the polls, regardless of whether they know anything about the issues or the candidates. The thing to be aimed at is not simply voting, but intelligent and interested voting; and energy spent upon getting ballots into the hands either of persons who are insufficiently informed to make intelligent decisions or of persons who are informed but have no clear opinions is misdirected. The second consideration is that the solution for the problem lies, not in dragging unwilling electors to the polls, but in improving the electoral system, raising the tone of political life, and laying more stress on broad civic education from early youth through adult years. "What we most need," writes one of the keenest students of the subject, "is to make registration less of an irksome task, the ballot simpler (with provision for the representation of minorities), elections less frequent, the issues clearer, party cleavages more distinct and vital, the party programs less evasive, and, above all, to organize our campaigns of civic education so that they will be more comprehensive, more persistent, and more effective in reaching those sections of the electorate which have enough intelligence to understand what it is all about."¹

A more direct and drastic solution has sometimes been suggested, in the form of legislation making voting compulsory. Let people who will not vote of their own accord, it is urged, be pressed to go to the polls by some penalty (in the form of a fine or eventual disfranchisement) for failure to do so without valid excuse. Several foreign countries—Australia, Switzerland, Belgium, Denmark, the Netherlands, Czechoslovakia, Argentina—have experimented more or less successfully with this procedure, and the constitutions of two of our own states, *i.e.*, Massachusetts and North Dakota, authorize laws on the subject whenever the

Sug-
gested
remedies

Proposal
for com-
pulsory
voting

based on 26,000 voting records in Ann Arbor; G. M. Connelly and H. H. Field, "The Non-Voter—Who He Is, What He Thinks," *Pub. Opinion Quar.*, VIII, 175-187 (Summer, 1944).

¹ W. B. Munro, "Is the Slacker Vote a Menace?" *Nat. Mun. Rev.*, XVII, 86 (Feb., 1928). Cf. H. F. Gosnell, "Motives for Voting as Shown by the Cincinnati P. R. Election of 1929," *ibid.*, XIX, 471-476 (July, 1930); C. Eagleton, "A Defense of the Non-Voter," *South Atlantic Quar.*, XXVII, 341-354 (Oct., 1928).

legislature sees fit to enact them.¹ The plan, however, offers many practical difficulties. At best, it could be proceeded with only state by state; and to affix appropriate and easily administered penalties would certainly not be easy. Moreover, the policy of drafting voters for an election runs counter to our concept of personal liberty—to say nothing of the consideration that voting is worth while only when interested and intelligent—and the American mind is not likely to be won over to it.

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¹ In several other states, e.g., California and Oregon, compulsory-voting measures have been rejected by the electorate, and the Missouri supreme court, in 1896, held such a measure unconstitutional.

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CHAPTER XI

POLITICAL PARTIES

Eighty-eight million men and women endowed with the ballot constitute an enormous reservoir of political power. Even such power, however, would merely dissipate itself and fail of significant achievement unless harnessed and directed; and the principal agency for channeling electoral power in large volume and definite direction is the political party. Out of a medley of differing opinions, principles, and interests arise, spontaneously or from persuasion, more or less stable groupings which, under leadership, strive to attract enough support to enable them to accomplish what all political parties chiefly aim at, *i.e.*, to capture the offices and to dominate the policies of government. Under a dictatorship, either there are no parties at all or none is permitted to exist except only the one that maintains the régime. In democracies, however, any number of parties may spring up and contend freely with one another. A main characteristic of democracy is, indeed, free party life.

Party Functions and Status

Parties
criticized
and dep-
recated

To be sure, the political party, like many another useful device, has been the object of a great deal of suspicion and criticism, in our own country as elsewhere. When, during the presidency of Washington, the people were unexpectedly found aligning themselves, under the leadership of Hamilton and Jefferson, respectively, in rival Federalist and Republican parties, thoughtful men deplored what was happening; and Washington himself felt it necessary, in his Farewell Address, to admonish that the "common and continual mischiefs of the Party are sufficient to make it the interest and the duty of a wise people to discourage and restrain it." The period from Madison's presidency to that of Jackson has been painted as a golden age of "good feeling" for the simple reason that (despite plenty of local and personal political strife) parties had for the time being largely disappeared. And after party rivalries again grew vigorous—notably in the decades following the Civil War—critics and reformers aimed their shafts, not only at rings and bosses and spoils, but at parties themselves as being perhaps the basic public evil of the time. Even today, one sometimes hears it charged that party names and platforms mean little, that principles receive mere lip-service, that policies are adopted or discarded mainly with a view to winning votes, that leadership is bankrupt, that indeed most parties are mere shams.

Sordid as are many chapters in their history, parties, however, are both inevitable and necessary—inevitable because the voters of not even a city or a county (to say nothing of the country as a whole) can ever be expected to be of one mind upon political principles and policies, or to agree upon the persons who should be placed in the public offices; necessary, because—while so-called non-partisan elections have proved their worth in jurisdictions of limited area and for the choice of certain types of officials, such as judges—no one has been able to show how the democratic process could be carried on over a wide expanse like a state or nation except with the aid of party organization and activity. Thinking of the matter particularly in relation to our own country, parties serve a variety of useful purposes,¹ (1) They help keep the people informed on public affairs; even though their propaganda be one-sided, they afford voters an opportunity to hear different sides and make up their minds. (2) In this way, parties stimulate opinion, and not only opinion but also action, since the thing that most often prompts the average voter to go to the polls at election time is party incentive. (3) Parties select candidates for the public offices and thereby enable voters holding the same general views to pool and concentrate their electoral power in a manner most likely to achieve results. (4) They stand, to some degree, as sureties for the satisfactory performance of official duties by persons elected under their sponsorship. (5) They provide constant watchfulness over and criticism of the conduct of government, a criticism often merely captious, it is true, yet on the whole serving usefully to keep the “ins” on their mettle. (6) Still another point often made in their favor is that they introduce a harmonizing element in government, particularly in a system, such as ours, grounded upon the principle of separation of powers. To be sure, they may tend rather to promote discord when, for example, the president is of one party and Congress dominated by a different one. But when, as most often happens, president and majorities in both branches of Congress—or, in the states, governor and majorities in both branches of the legislature—are of the same party, such harmony of political affiliation and viewpoint makes powerfully, as a rule, for expeditious and effective conduct of affairs. Still other uses of parties will occur to any one who thinks about the matter—for example, the fashion in which they bridge the cleavages and soften the frictions in our society, serving (to change the figure) as a sort of cement holding together people of divergent race, religion, culture, and occupation throughout the broad expanse of the country.¹

Yet inevitable
and necessary

Uses
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serve

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¹ C. A. Beard, *The Republic; Conversations on Fundamentals* (New York, 1943), Chap. xviii, “Political Parties as Agencies and Motors.” Parties are, of course, by no means the only agencies or channels through which public policy is influenced. The press is another. And the country abounds in organizations—the National Association of Manufacturers, the Farm Bureau Federation, the A. F. of L. and the C. I. O., the American Legion, the National League of Women Voters, and what not—that constantly, and often effectively, press their points of view upon legislators and administrators, and of course upon party organizations too.

Incentives to party affiliation

What is it that influences men and women to identify themselves with one party rather than another? There is, of course, no single answer; and only a few observations can be offered here. To begin with, there are people who, in point of fact, do not so identify themselves at all, but on the contrary make a virtue of being politically "independent." Independence in politics first challenged attention on a large scale in the later nineteenth century, when, in revolt against the evils encouraged or condoned by the parties of their day, many men of lofty civic ideals not only cut loose from party affiliations, but preached the doctrine that all good citizens should stand ready to uphold principle and support good candidates without regard to party label. Independents in politics there still are, besides an increasing number of men and women who, although normally belonging to a given party, have no hesitation about "scratching" tickets and voting, at least occasionally, for candidates put up by the opposition. Beginning with the elections of 1932, many people who previously voted Republican have voted Democratic; and in the 1940 and 1944 presidential elections a good many Democrats supported a Republican candidate. Speaking generally, however, people have rather fixed, if not inflexible, party affiliations; and still the question remains as to what it is that determines such affiliations.

Three or four main influences appear. The first is family tradition or inheritance. The point cannot be proved, but the guess may be hazarded that more people in the United States are Republicans or Democrats because their fathers and grandfathers were such than for any other reason. A second factor is environment outside the family, i.e., in the community or region. In South Carolina, it is the customary thing to be a Democrat; public opinion expects, and almost requires, it; in Vermont, one flies in the face of tradition and opinion by being anything other than a Republican. Closely related to this regional, or sectional, aspect (indeed, all of the various factors are intermingled) is the highly important matter of economic interest. The backbone of the early Federalist party was the commercial, financial, and industrial elements of New England and the Middle States; that of the Jeffersonian Republican party, the farmers and planters of the South and the rural North; and, speaking very broadly, the interests thus aligned continued to dominate the later parties of the respective lineages. So dominated, the parties developed policies and programs accordingly—in the case of the Federalists-Whigs-Republicans, high protective tariffs, centralized banking, currency based on gold, strong national government devoting itself to the promotion of commercial, manufacturing, and business interests; in the case of the Jeffersonian Republicans and later Democrats, states' rights, low tariffs, state banks, "free silver," anti-imperialism. At no time, of course, has any party enlisted the undivided support of any particular economic group or interest; too many other factors in party alignment cut across the economic ones and blur the pattern. And the

greatly increased complexity of economic life has made for steadily increasing confusion—so much so, for example, that large numbers of Democrats from as far back as World War I have appeared in the strange rôle not only of ardent nationalists but of frank and unashamed protectionists. By and large, however, occupation, business, economic self-interest, have always had great potency in attracting to or repelling from party membership. Finally, it is only fair to recognize that there is such a thing as deliberate choice among parties by persons able to surmount inheritance, association, or interest and to decide calmly to support a given party as being, on the whole, most likely to promote the well-being of the country. Naturally, persons who do this are inclined to political independence, although they also may become strong partisans.¹

Elsewhere the point has been stressed that no amount of study of the national and state constitutions, or of statutes, municipal charters, and other such documents, will give one an adequate understanding of our system of government and how it works. A main reason is that the formal institutions with which the documents deal frequently do not operate as one would be led to suppose, or indeed as originally intended. And as often as not the reason, in turn, why they do not do so is traceable to the rise and growth of political parties. Constitutions and statutes create machinery and confer powers; but flesh is put upon the dry bones and energy imparted to the mechanism largely by the instrumentalities and driving force of parties. Significant as they are, parties have developed to their present maturity outside of the constitutional system; not a word is said about them in the national constitution, and little or nothing in the majority of state constitutions. For almost a hundred years after they attained importance, there was also but little legislation concerning them in the states; and Congress, although long a main arena of party combat, passed the first law regulating party activities in any important manner less than forty years ago, *i.e.*, in 1907.² Notwithstanding a good deal of federal, and especially state, law on the subject today, parties are still, in the main, spontaneous and self-governing organizations.³

Constitutional
and
legal
status

¹ C. A. Berdahl, "Party Membership in the United States," *Amer. Polit. Sci. Rev.*, XXXVI, 16-50, 241-262 (Feb., Apr., 1942). In other parts of the world, there is a tendency for parties to be organized on the basis of a definitely enrolled, dues-paying membership to which one is admitted by formal act. In the United States, party membership commonly means nothing more than more or less habitual support of the party's candidates at election time. In several of our states, registration lists (see p. 205 below) show whether a voter classes himself as a Republican or a Democrat; but this is usually the nearest approach to anything in the nature of a party "roll."

² See p. 195 below.

³ For a detailed treatment of the subject, see J. R. Starr, "The Legal Status of American Political Parties," *Amer. Polit. Sci. Rev.*, XXXIV, 439-455, 685-699 (June, Aug., 1940).

The Two-Party System

The
historical
pattern

In countries outside of the English-speaking world, it has been usual to find a large—sometimes a very large—number of parties contending with one another. For good historical reasons, England, however, developed only two important parties;¹ and the same is true of all countries in which English traditions have been dominant. In our own case, when parties began, there were two great contending political philosophies and programs, the Hamiltonian and the Jeffersonian; and the first parties—Federalist and Jeffersonian Republican—sprang into being as groupings grounded upon this division. Later, most voters found themselves in either the Whig or the Democratic party; and since the Civil War the great majority have called themselves either Democrats or Republicans! This does not mean, however, simply two great integrated forces opposing each other. As any one at all familiar with current politics is aware, both of the two great parties today contain sectional and other groups and “wings” which in a European environment would likely be found operating as separate parties. Nevertheless, in a broad sort of way, the two major parties have reflected more or less coherent and distinctive interests, mainly economic; and, these interests being to a considerable extent sectional, the fortunes of either party in a given period have commonly depended heavily upon the success of its leaders in bringing about a combination of dominant interests in two or more great divisions of the country.

Minor
parties

To be sure, from the first quarter of the nineteenth century onward, dissatisfied elements have persisted in launching independent, or “third-party,” movements; and there has rarely been a time when the political scene was not somewhat confused by the existence of one or more such minor parties. There were the Anti-Masons of 1826 and after; the Liberty party, appearing about 1840; the Free Soil party, active in the election of 1848; the Native-American, or “Know-Nothing,” party which flourished in the fifties; the Republican party itself, which began as a third party in 1854-56; the Prohibition party, dating from 1872; the Greenback party of the seventies; the People's, or “Populist,” party of the nineties; the Socialist party, starting about 1897; the National Progressive party of 1912; the Farmer-Labor and Communist parties, formed about 1920; the LaFollette Progressive party, which made an impressive showing in 1924; a Union party, which achieved some prominence in 1936; and, most recently, a Communist Political Association which, in 1944, was announced as successor to the former Communist party, although probably involving little more than a change of name. Rising usually in times of discontent, some of these parties momentarily attained sufficient strength, especially in pivotal states, to affect the results of

¹Since the rise of the Labor party, there have been three, but with a tendency of the historic Liberal party to fade out of the picture.

even a presidential election,¹ and one—the Republican—grew into a major party. As a rule, however, third parties have been significant mainly as revealing and crystallizing dissenting opinion—especially, of late, upon economic and social matters—and as threats to the major parties, driving them, however reluctantly, to take up issues and assume positions calculated to find favor with elements of the population chiefly appealed to by a given third-party movement. A remarkably large proportion of leading party issues in the past several decades—the income tax, the regulation of railroads and other corporations, the use of injunctions in labor disputes, woman suffrage, prohibition, and others—were more or less forced upon the major parties in this way. No third party since the rise of the Republicans, however, has ever approached capturing control of the national government;² and although from time to time some sweeping realignment of party forces is predicted, the government bids fair to continue for a good while to be found in the custody of either the Democrats or the Republicans. In general, minor parties fared poorly in the elections of 1944.³

¹ The political history of New York affords several examples. In 1844, the Liberty party's vote in that state was sufficient to throw the state's electoral vote to James K. Polk, the Democratic candidate, and so to insure his election over the Whig candidate, Henry Clay; in 1848, the Free Soil party drew away so many votes from Cass, the Democratic nominee, that the Whig candidate, General Taylor, carried the state; and in 1884, the Republicans held the Prohibitionists responsible for the loss of the state and the resulting election of Grover Cleveland. Of late, an American Labor party has assumed sufficient importance in the state (400,000 votes in 1942 and almost 500,000 in 1944) to make it easily capable of swinging a close election. Indeed, in 1944, President Roosevelt carried the state only by virtue of capturing the vote of that party and of a party almost as large that had split off from it, known as the Liberal Party. Cf. J. D. Hicks, "The Third Party Tradition in American Politics," *Miss. Valley Hist. Rev.*, XX, 3-28 (June, 1933).

² In fact, since 1860 there have been only four presidential elections in which third parties have polled more than ten per cent of the popular vote: the Liberal Republicans in 1872, the Populists in 1892, the National Progressive party in 1912, and the La Follette Progressives in 1924. At most elections since 1860, not one vote in twenty has been cast for candidates of all minor parties taken together. Such parties have elected comparatively few congressmen, and except in 1872, 1892, 1912, and 1924, they have never carried any states. See A. N. Holcombe, *The Political Parties of Today* (New York, 1924), Chap. xi. In the 1940 election, minor parties polled only 239,450 votes, or 0.5 per cent of the total. Many states now deny a place on their ballots to the Communist party (in the case of some, to any "un-American" party). See H. F. Ward, "The Communist Party and the Ballot," *Bull. of Rights Rev.*, I, 286-292 (Summer, 1941); and for a more recent résumé, with discussions of the declining activities of minor parties in general, H. A. Bone, "Small Political Parties Casualties of the War?," *Nat. Mun. Rev.*, XXXII, 524-528 (Nov., 1943). The change of name of the Communist party in 1941 did not lead to any relaxation of the election laws affecting it. Cf. B. Moore, "The Communist Party of the U. S. A.; An Analysis of a Social Movement," *Amer. Polit. Sci. Rev.*, XXXIX, 31-41 (Feb., 1945).

³ It is not proposed to introduce in the present edition of this book an historical sketch of American political parties. Such an outline, if desired, will, however, be found in the 5th edition (1935), pp. 167-178. Interpretative books, with emphasis upon economic factors, include A. N. Holcombe, *The Political Parties of Today*, mentioned above, *The New Party Politics* (New York, 1933), and *The Middle Classes in American Politics* (Cambridge, Mass., 1940); also W. E. Binkley, *American Political Parties; Their Natural History* (New York, 1943).

National Parties in State Politics

With the exception of occasional localized "third" parties—*e.g.*, the Progressive party in Wisconsin, the recent Farmer-Labor party in Minnesota, and the American Labor party in New York—political parties in the United States are nation-wide, and consequently are concerned primarily with the national government's operations and policies. But they have not confined their activities to the national sphere—to the election of senators and representatives in Congress, and of president and vice-president. On the contrary, their existence and activities have profoundly affected state, and even county and municipal, affairs. For the principal executive officers and the members of the legislature in practically all of the states, as well as a large majority of the judges, have long been nominated and elected as adherents of one or another of the two principal national parties; and most elective county, city, and other local officers are chosen because of similar party attachments. ✓

Reasons
for
national
party
activity
in the
states

To many people, this projection of national party lines into the field of state and local politics seems not only illogical but inexplicable, unjustifiable, and responsible for much of the inefficiency of state and local governments. And it has to be admitted that it is not always easy to perceive any logical connection between the conduct of state, county, and municipal government and Republican and Democratic policies relating to national affairs. An explanation, although it may not be an adequate justification, is not hard to find. In the first place, the importance of the national government, the far-reaching significance of national party issues, the exalted position of the presidency, the dramatic and often spectacular methods employed in national campaigns, the powerful attraction of certain national leaders, and the varied and fervent appeals to the electorate combine to arouse a keener interest and to stimulate a larger participation in national than in purely local and state elections. To the national party with which the ordinary citizen becomes identified in such campaigns, there springs up an instinctive attachment, an attitude of loyalty, perchance a zealous devotion, against which purely local or state parties rarely have found it possible to prevail. Secondly, regarded from the viewpoint of national party leaders, the maintenance of national party organizations as active participants in state and local elections is a measure of preparedness for the great presidential battles occurring once in four years, and also for the hardly less important congressional campaigns falling midway between presidential elections. Inasmuch as the states constitute the basic units for election to these national offices, state political organizations inevitably form the basic units in the national party system. State and local officers also are often chosen concurrently with national officers, as well as in the intervals between national elections; hence national party activity in connection with the nomination and election of state and local officers serves to keep

the national organization more alert and active, recruited more nearly up to its maximum strength, the different parts better articulated and running more smoothly, than if it were called into service only once in two or four years. Moreover, a steadily increasing proportion of people in most states now live in cities; hence, from the point of view of party leaders at least, the party's chances of winning the great national contests will be materially enhanced if the national organization can maintain from year to year, in every important city, well-organized units led by veterans seasoned in local political skirmishes.

Finally, a partial justification for national party activity in state and local governments is to be found in the fact that many of our most serious problems locally, such as poverty, unemployment, child labor, high cost of living, physical degeneracy, water supply, sewage disposal, clearance of slums, social insurance, transportation, communication, and the naturalization and Americanization of aliens, cannot be solved—indeed the solution of some of them can scarcely be even commenced—without the coöperation of both state and national governments, which entails the coöperation of national political parties.

Inter-
relation
of
national
and local
problems

Notwithstanding this explanation and partial justification, many people are convinced that the existence of national party lines in state and local politics has been productive of more evil than good, and that, in particular, it has been largely to blame for the existence in many populous communities of unscrupulous and corrupt political machines masquerading under the name Republican or Democrat. Numerous efforts have therefore been made to divorce national and state party activities. Many states now have some provision for holding state and local elections, so far as practicable, in the intervals between national elections, in the hope that local issues will thus be confronted solely upon their own merits, unclouded by national considerations, even though the state officials continue to be elected as Republicans, Democrats, or Socialists. Another step in the same direction has been the adoption of the non-partisan ballot, *i.e.*, a ballot bearing no indication of the party affiliations of candidates, for the nomination and election of many city and county officers, judges of municipal or state courts, some of the principal state executive officials, and members of the legislature in Minnesota and Nebraska.

Move-
ment for
non-par-
tisan
elections

Wherever the non-partisan ballot has been adopted, it has been generally assumed by its advocates that the influence of national party organizations will be eliminated from elections, or at any rate reduced to a minimum. In many instances, this has turned out to be the result, especially in relatively small communities. But in states or large cities having highly organized national party machines operating the year around, the outcome has been, and is quite likely to be, entirely different. Each political organization is almost certain to have its favorites upon the non-partisan ballot, in which case word is passed around—sometimes

Spurious
elections
"non-
partisan"

publicly, at other times in whispers—that such and such men are the “organization” candidates, and they receive partisan support to almost the same extent as candidates who publicly bear the party label.[†] Too great hope of regenerating state and municipal politics must not, therefore, be staked upon the mere removal of national party labels from the ballot. It should be remembered also that while the Democratic and Republican labels may not signify much in state or local elections, they at least give the ordinary voter some idea of the forces or organizations behind the candidates; whereas, with a non-partisan ballot, he may be left quite in the dark. Obviously, a poor clue under such circumstances is better than none at all.

National Party Organization

Two sets
of com-
mittees

† From this comment on national party activity in states and localities, we turn to the plan of organization through which parties nowadays attain, or seek to attain, their chief objective, namely, control of the national government itself. For about a hundred years, the machinery of the two major parties has consisted chiefly of two series or sets of committees, one confining its activities almost entirely to the election of the president, vice-president, senators, and representatives in Congress, the other functioning in connection with the election of state and local officials. With national and state elections usually taking place at the same time, the two sets of committees coöperate more or less closely during a presidential campaign. While, however, the activities of the national committee overshadow those of state and local committees, the two organizations are entirely separate, and the national committee has no power to dictate to the state committees.

The
national
com-
mittee:
1. Com-
position

Until 1920, the Republican and Democratic national committees consisted of one member from each state, territory, dependency, and the District of Columbia. In that year, the Democratic party doubled the size of its committee by authorizing the election of one man and one woman from each state or other unit represented in the national convention; and four years later, the Republicans followed their example. Prior to 1912, members of both Republican and Democratic national committees were “nominated” by the several delegations in the national convention and formally “elected” by the entire convention. Subsequently, the wide adoption of state direct primary laws led to some modification of this practice, although in theory the national convention continues to elect. Where state laws require committeemen to be chosen in a party primary or in some other specified manner, the persons so designated are regarded as “nominated” to the national convention, and the convention proceeds to elect them to the national committee as a matter of form.

[†] This happened regularly in the “non-partisan” election of judges in Pennsylvania in 1913-21.

* The principal functions of the national committee are to decide, several months in advance, upon the time and place of holding the national convention, to issue the formal call for the election of delegates, to appoint local committees to make preliminary arrangements for the convention, to make up the temporary roll, and, after the convention adjourns, to select a national chairman (in consultation with the presidential candidate) and assist him in the conduct of the campaign. Between presidential elections, the committee usually falls into a state of suspended animation until the approach of the time for the next national convention, although in recent years permanent headquarters, in charge of a limited staff, have been maintained continuously between presidential elections.

2. Functions

✕ At the head of the national committee, and serving as commander-in-chief of the party's forces throughout the campaign, is the national chairman, nominally elected by the committee, but in reality the personal choice of the presidential candidate;¹ and upon this chairman the committee devolves full authority and responsibility for managing the campaign, although naturally assisting in such ways as it can in carrying out the plans and policies which he (in conjunction with the presidential candidate) formulates. The principal auxiliary officials include one or more vice-chairmen (elected by the national committee or appointed by its chairman), a secretary and an assistant secretary, and a treasurer. An executive committee is usually named by the national chairman, the members of which serve as his staff officers and advisers during the campaign; and the work carried on under the national committee's auspices is usually handled by a dozen or more bureaus, departments, or divisions, including a speakers' bureau, a publicity department, a purchasing department, an advisory committee, a congressional committee, a foreign-language division, a research division, a commercial travelers' bureau, a labor division, a farm division, a club division, and colored women's, colored men's, and colored speakers' bureaus.

The national chairman and other officers

Comparatively inconspicuous in presidential campaigns, but prominently active in connection with congressional and senatorial elections occurring between presidential elections, are the congressional and senatorial committees which assist in the election of members of Congress bearing their respective party labels. The Republican congressional committee is composed of one congressman from each state having a Republican member in the House of Representatives, nominated by the state delegation and formally elected by a caucus of the Republican representatives. The Democratic congressional committee consists of one member from each state. He or she is usually a member of the House of Representatives, and if so, is selected by the delegation from that state. But if the state is without a Democratic representative, the committee chairman may appoint some one, usually an ex-member, to represent it. Since the

Congressional and senatorial campaign committees

¹ See p. 234 below.

adoption of popular election of senators, similar committees have been organized by both parties to assist in the election of party candidates for the Senate; and although these committees are reorganized every two years, the members are generally retained as long as they remain in Congress and are willing to serve, unless they become candidates for reelection, in which case they retire from the committee during that campaign.

Upon the opening of a presidential contest, these congressional and senatorial committees place all of their resources at the disposal of the national committee and become its close allies, foregoing much of their own initiative, even in what concerns the election of senators and representatives. After all, in "presidential years" practically all elections follow the fortunes of the contest for the presidency. But in "off years" the committees are much more conspicuous; they then have entire charge of the congressional campaign, relying, of course, upon the cooperation of state and local committees. They distribute political literature, maintain speakers' bureaus, and raise and disburse money in considerable amounts, giving special attention to doubtful states or districts; and they often intervene to smooth out local factional differences. In intervals between elections, too, they keep more or less in touch with the district and central committees in the different states, endeavoring in every way to promote the party's interests.

State and Local Party Organization

State
central
com-
mittee

Although entirely separate pieces of machinery, the committees forming the national party organization function most effectively when they have full cooperation from the multitude of committees making up the more continuously active party organizations in the states. In every state, the two major parties, and in some states minor parties as well, maintain a central committee which serves as the head of the state party organization. In size, composition, and powers, these central committees vary greatly, as also do the subordinate committees farther down the scale. Such matters are now regulated by law in most states; but in the absence of law, party rules govern. Members of the state central committee commonly represent either counties or legislative or congressional districts, and are either elected directly by the party voters or chosen by delegate conventions for four years. When the convention system held undisputed sway, the state central committee, or a group within it, often exerted decisive influence upon the action of the state convention in selecting candidates; but in states that have adopted the direct primary, the committee's influence upon nominations has declined, or at all events has become much less conspicuous and decisive. Nowadays, the committee's energies are concentrated upon promoting election of party candidates (national and state) and maintaining efficient party organization throughout the state between elections. Occasionally, too, it is empowered to formulate the state party platform.

Subordinate to the state committee, and operating in a more restricted sphere, are often similarly constituted committees in congressional, legislative, or senatorial districts. But in any event, of special importance are the county committees, with their chairmen—found in practically every county, and city central committees, found in almost all cities, and especially influential in the largest municipalities. Nearly every city ward and voting precinct also has its dual or triple set of party committees—at all events, its ward leader and precinct leader or captain; and the same is true of almost every village and township. Members of county and other local committees are usually elected directly by the party voters in the subdivision concerned. Originally, all such committees consisted exclusively of male voters; but with the adoption of woman suffrage, many committees have expanded their membership so as to admit women; while in other instances the hierarchy of men's committees is paralleled with a series of women's committees.¹

Subordinate committees

The main purposes of our elaborate party organizations, whether national or state, are to inform voters concerning the issues of the campaign, the policies and records of the rival parties, and the merits of candidates; to kindle the enthusiasm and quicken the loyalty of the rank and file; to win over people who have no definite or permanent party attachment;² to make canvasses of voters before election day in order to ascertain the drift of public sentiment; to see that the maximum party vote is polled; and finally, if the party wins, to see that party workers are rewarded with places on the public payroll, that legislation is enacted which will strengthen the hold of the party upon the voters, and that administrative policies are developed which, in one way or another, will reflect credit upon the party generally.

Purposes of party organization

¹ It should be understood that the party machinery here described is fundamentally a different thing from the political "machines" of which we often hear. The real party machinery or organization is the above-mentioned series of committees, ramifying throughout the state. Every state, county, and other local subdivision has its party machinery in this sense; happily, some states and many counties and smaller communities are without any political "machine." In the larger cities, on the other hand, the series of committees is sometimes identical with, or at least controlled by, a local "machine," in which case it is not inaccurate to use the terms machine and party organization interchangeably. Thus, the Tammany machine is the Democratic organization in New York county, and the Republican machine in Philadelphia is the Republican organization of that city. Sometimes the party organization for an entire state becomes a "state machine." Thus there used to be a "Hill machine" controlling the Democratic state organization in New York, and a "Quay machine" and a "Penrose machine" similarly dominant in the Republican state organization of Pennsylvania. Usually, however, the term "machine" applies to some smaller area and some lesser group of politicians, so that it is possible to find several "machines" within the same party in a single state. On the other hand, there is ordinarily only one Democratic or Republican organization for a state.

² To influence voters, party committees employ an infinite variety of means and methods, including mass meetings or "rallies"; parades, barbecues, and fireworks; paid and volunteer campaign speakers and glee-clubs; lawyers', merchants', working-men's, and many other temporary clubs; organizations of colored voters, of Irish, Jewish, Italian, Scandinavian, Polish, German, and other foreign-born voters; leagues of college and university students; tons of campaign literature; an immense amount of advertising in newspapers and magazines and on billboards; and extensive radio broadcasting.

Com-
mittee
activities

With a view to bringing about the nomination of an "organization slate," or ticket of candidates favored by those in control of a given committee or series of committees, committee activities sometimes begin long in advance of the primaries or conventions in which candidates are nominated. The greater part of committee work, however, has to do directly or indirectly with the conduct of the "campaign" that starts shortly after nominations are made. State and local committees are particularly active in seeing that new arrivals and first-voters are properly registered; in assisting aliens to qualify by obtaining naturalization papers; in instructing voters as to registration formalities, the location of polling places, and the proper way to mark a ballot or operate a voting-machine; in raising campaign funds in the local field; in employing speakers and distributing campaign literature;¹ in appointing party watchers to serve at the polls, and often also virtually appointing precinct election officials.

Party Finances

Forceful and efficient conduct of any political campaign in which a large number of voters must be appealed to—especially a presidential or a state campaign, or even one restricted to a single large city—necessitates the collection and disbursement of large sums of money; indeed, the first, and often the principal, task of many of the party committees mentioned above is to raise money, *i.e.*, "campaign funds." As a rule, the duty devolves primarily upon the treasurer of the national or other committee most directly concerned, or is assigned to a director of finance and a committee on ways and means; and such officials leave no stone unturned in their search for "the sinews of war."

Expen-
ditures
in recent
presiden-
tial cam-
paigns

No official records of expenditures in connection with national campaigns were published until 1908. Since that date, however, there has been something more substantial to rely upon than mere estimate or conjecture; for full publicity was voluntarily given to both contributions and expenditures in 1908, and since 1910 such publicity has been required by national law.² The Hoover-Smith campaign of 1928 saw more money raised and expended than on any previous occasion—more than \$10,000,000 in the case of the Republicans and nearly \$7,500,000 in that of their leading opponents. Four years later, the country was in the depths of depression, and the amounts spent fell to \$2,900,052 and \$2,245,975, respectively.³ In 1936, however, outlays again reached an all-time high, the Republicans spending \$14,198,202.92 and the Democrats,

¹ A few states have laws which require the printing and mailing to every voter before primaries and elections of "publicity pamphlets" in which are to be found statements by the various party committees or candidates bearing upon their respective claims to favorable consideration.

² *Code of the Laws of the U. S.* (1934), 21-23.

³ L. Overacker, "Campaign Funds in a Depression Year," *Amer. Polit. Sci. Rev.*, XXVII, 769-783 (Oct., 1933).

\$9,228,406.85.¹ In the 1940 campaign, the Democrats paid out considerably less than in 1936 and the Republicans considerably more—the former spending \$6,095,357.79, and the latter \$14,941,142.87.²

Whence come the funds with which to meet outlays on such a scale? Speaking broadly, from anybody who can be induced to give. Party officials and candidates and party office-holders are, of course, expected to dig into their pockets. In later years, widely heralded efforts have been made to democratize party funds by securing contributions of a dollar or similar small amount per person from the rank and file, though the plan has never met with great success. Far and away the largest proportion of the money raised comes from people who have, or think they have, something at stake—usually, of course, some business or other economic interest—in the success or defeat of a given party. Corporations are forbidden by law to contribute. But this does not stand in the way of gifts by officers, directors, and stockholders, acting as individuals; and any list of larger contributors to especially the Republican coffers (in lesser degree to the Democratic also, at least until 1936³) is studded with the names of representatives of big business—Du Ponts, Mellons, Rockefellers, Pews—and people, too, of less conspicuous yet substantial business interests and connections. Likewise, since 1943 labor unions have been forbidden to contribute; but this did not prevent an auxiliary of the C.I.O. known as the Political Action Committee from approaching the campaign of 1944 with a fund of \$675,000 to be spent in the interest of President Roosevelt's reelection, and with assurance that more would be provided by the affiliated unions if required. Still, even in days when no effort had as yet been made to restrict the size of donations, the number of really large gifts to the national committee was small—in 1936, only three of over \$50,000 and only 2,349 of over \$1,000 (including both parties).⁴

The
sources
of cam-
paign
funds

¹ Senate Report No. 151, 75th Cong., 1st Sess., "Investigation of Campaign Expenditures in 1936." Cf. L. Overacker, "Campaign Funds in the Presidential Election of 1936," *Amer. Polit. Sci. Rev.*, XXXI, 473-498 (June, 1937).

² Senate Report No. 47, 77th Cong., 1st Sess. (1941), p. 142. Cf. L. Overacker, "Campaign Finance in the Presidential Election of 1940," *Amer. Polit. Sci. Rev.*, XXXV, 701-727 (Aug., 1941). The Senate special committee to investigate campaign expenditures in 1944 reported just as these pages were going to press, and it was impossible to indicate the results except to record that while the Republican and Democratic national committees reported expenditures of \$2,828,651 and \$2,056,121, respectively, the combined actual outlay of all organizations was \$23,021,878—the largest in our electoral history. See *N. Y. Times*, Mar. 16, 1945.

Of course, the expenditure figures for presidential campaigns, large as they are, by no means tell the whole story; for large sums that go unreported are raised and spent by local party and non-party committees. Cf. J. K. Pollock, *Party Campaign Funds*, Chap. III.

³ The business world's aversion to the New Deal was reflected in that year in the conspicuous abstention of bankers and manufacturers from support of the Roosevelt candidacy.

⁴ A considerable number of individual gifts of over \$50,000, and many others of over \$1,000 went, however, to state and local party committees and various party auxiliaries.

Why ex-
pendi-
tures
are so
large

The experience of the Republicans in 1932, 1936, and 1940 would seem to indicate that national elections cannot be won with "big money." And in point of fact, the apprehensions of people who deplore the expenditure of sums such as those mentioned, as being fraught with sinister possibilities for our democratic institutions, are not well founded. Uninformed as a rule concerning the legitimate cost of conducting a national campaign—to say nothing of more than two-score state campaigns and a stupendous number of municipal and other local campaigns—the public is prone to regard outlays on the present staggering scale as presumptive evidence of widespread attempts to debauch the electorate. And rival party organizations, or candidates, with more restricted financial resources regularly take advantage of this popular suspicion and loudly denounce the "slush funds" of their opponents. Yet any fair-minded citizen who will investigate the facts will find that it takes only a few items of a perfectly legitimate nature to aggregate a million dollars or more. Like other forms of publicity or advertising, campaigning has come to be tremendously expensive. One reason is that the electorate has been more than doubled by the extension of suffrage to women; so that, allowing five cents for stationery, printing or typing, and postage, more than \$3,000,000 would be required merely to prepare and mail one circular letter addressed to all of our sixty million (in 1940) registered voters.¹ A nation-wide campaign necessarily involves the expenditure of hundreds of thousands, if not millions, of dollars, in the aggregate, for the rental of headquarters and places for holding political meetings, for printing and distributing campaign literature, for the traveling expenses of speakers and the higher party officials, for a small army of organizers, canvassers, clerks, copyists, typists, tabulators, and addressers, to say nothing of the cost of advertising in newspapers, in magazines, on billboards, and by radio.² When all of these entirely legitimate objects of expenditure are duly listed and footed up, it will not be hard to understand why, in spite of searching investigations by Senate committees in connection with every presidential campaign from 1920 to 1944 inclusive, almost no evidence has come to light justifying suspicion of extensive corruption in the national politics of recent years.

¹ There is not as yet, and probably never will be, a trustworthy registration figure for 1944. The total number of men and women of *voting age*, January 1, 1944, was reported by the Bureau of the Census as 88,666,555, as compared with 79,863,451 four years earlier.

² On radio broadcasting alone, the Republican national committee spent in 1932 approximately \$550,000 and in 1936 \$757,737, or about twenty and eleven per cent of the total outlays, respectively; the figures for the Democratic committee were \$343,415 and \$582,327, or seventeen and thirteen per cent, respectively. In 1940, the Democrats spent for this purpose about \$387,000 (17.6 per cent), and the Republicans, about \$335,000 (fifteen per cent), although in the latter case almost as much again was spent by agencies other than the national committee. The figures for 1944 were not available at the date of writing, but they were known to be in excess of any previous ones—apparently somewhere between one and one-half and two million dollars, divided almost evenly between the two major parties (the Republicans estimated their outlay at \$350,000), but counting in outlays not incurred by the national committees as such.

Nevertheless, the raising and spending of money for such purposes as winning elections opens plenty of possibilities of abuse; and both nation and states now have laws, known as "corrupt practices acts," regulating campaign contributions and outlays; such laws, indeed, have been a principal means by which parties and their activities have been given state, and to a certain extent federal, statutory recognition. The corrupt practices legislation of forty-eight states is too diverse to be described in detail here; although it may be said that the principal things provided for are (1) restriction of sources of contributions, (2) limitation of expenditures in both primaries and elections, (3) prohibition of bribery, treating, intimidation or impersonation of voters, stuffing ballot-boxes, tampering with voting-machines, and other corrupt practices, and (4) publicity for contributions, or expenditures, or both.¹

Laws
regulat-
ing party
finances -
corrupt
practices
acts

Regulations imposed by Congress, and applicable, of course, only to campaigns and elections involving the choice of president, vice-president, senators, and representatives, may be summarized under four heads. (1) *Limitations on the raising of money.* Under federal civil-service law, persons on the federal payroll may not be solicited for contributions for political purposes by any officer or employee of the government. An act of 1907 forbids any corporation organized under national law to contribute to any campaign fund whatsoever, and also makes it unlawful for any corporation (organized under state law) to contribute to such a fund in connection with the election of president, vice-president, senators, or representatives. The Smith-Connally War Labor Disputes Act of 1943 irrelevantly extended these restrictions, too (for the duration of the war), to labor unions.² Under the first Hatch Act (described below), no contributions from relief workers are to be received. And under the second Hatch Act, no individual or association may contribute more than \$5,000 in any calendar year to the campaign of any candidate for a federal office. (2) *Restrictions on amounts that may be spent.* The Federal Corrupt Practices Act of 1925 limits the election expenditures of a candidate for the Senate to \$10,000 and of a candidate for the House to \$2,500, unless a lower maximum is fixed by the law of a state, in which case that law is to govern. A candidate has a right, however, to the benefit of an alternative rule under which he may spend up to three cents per vote cast for all candidates for the given office in the last preceding general election, with a maximum of \$25,000 for a senatorial candidate and \$5,000 for a candidate for the House. In line with the Supreme Court's

¹ The subject is discussed at length in E. R. Sikes, *State and Federal Corrupt Practices Legislation* (Durham, N. C., 1928); and somewhat more recent information will be found in H. Best [comp.], *Corrupt Practices at Elections*, 75th Cong., 1st Sess., Sen. Doc. No. 11 (1937).

² Labor unions or individual workers are legally free, however, to engage in any form of political activity, including the use of money in connection with primaries, so long as they do not contribute *directly* to party funds used to promote the election of candidates for president, vice-president, or seats in Congress. They may themselves spend money to influence such elections; and in 1944 they did so lavishly, especially (as noted above) through the medium of the C.I.O.'s Political Action Committee.

implication in the Newberry decision of 1921 that Congress has power to regulate elections only, and not nominating procedures,¹ the act specifically exempts primaries from its provisions—which, of course, leaves a big loophole.² One other relevant restriction, found in the Hatch Act of 1940, is that no “political committee” operating nationally may expend more than \$3,000,000 in any calendar year. (3) *Limitations on the purposes for which money may be spent.* State laws are usually quite ample on this subject, but federal restriction does not extend much beyond prohibition of the more obvious types of corrupt practice; indeed, in limiting the amount of expenditure as mentioned above, the law specifically exempts outlays of candidates on stationery, postage, circulars, telegraph and telephone service, and for “personal” items, thereby failing (at least under the last-mentioned category) to close another sizeable loophole. (4) *Requirement of publicity.* This takes two main forms. First, every candidate for the Senate or House is required to file with the secretary of the Senate or the clerk of the House, as the case may be, a full report of all contributions received in support of his candidacy and an itemized *statement of expenditures*. Second, all party committees (and likewise all other committees, organizations, and associations which receive donations or spend money for political purposes in two or more states) must make full periodic reports, under oath, of their financial operations.

The
Hatch
Political
Activity
Acts of
1939-40

Regulations on these lines have no doubt been beneficial. They do not seem, however, to have had much effect in keeping down the sum total of expenditure; and even if they were enforced with less laxness than commonly prevails, they would still leave too many avenues for evasion to constitute an adequate safeguard against electoral abuses.³ With a view, among other things, to reinforcing and extending the federal corrupt practices laws, Congress in 1939 and 1940 passed the two important, although still not fully effective, Hatch Acts already mentioned.⁴ Under terms of the first—designed primarily for a period when great numbers of people were on relief rolls—(1) persons on the federal payroll are protected against intimidation or coercion in connection with voting at elections; (2) solicitation or receipt of political contributions from relief workers is prohibited; and (3) the use of relief funds to coerce voters, such as was reported by the Sheppard Senate committee in connection with the congressional campaign of 1938, is likewise forbidden. The second measure (1) extended protection against partisan coercion

¹ An implication completely reversed in 1941 in the case of *United States v. Classic* (see p. 170 above).

² Another such loop-hole is the total absence of any restriction upon outlays made independently in behalf of a candidate by his friends or by organizations or interests supporting him.

³ Defects in the federal corrupt practices laws, and proposed remedies, are discussed briefly in J. K. Pollock, *Party Campaign Funds*, Chap. vii; L. Overacker, *Money in Elections*, Chaps. xi, xiv; and *Report* of the Gillette Senate committee in 1941.

⁴ 53 U. S. Stat. at Large, 1147; 54 *ibid.*, 767. These measures are discussed at more length below (see pp. 439-441) in connection with the federal civil service.

and assessments to officers of state and local governments who are paid in whole or in part from federal funds, and (2) sought further to prevent the extravagant use of money in national elections. Besides prohibiting the purchase of commodities or advertising when the proceeds of such purchase are to be used for political purposes, the act limits receipts by any political committee (operating in more than one state), and likewise expenditures by such committee, as indicated above, to an amount aggregating \$3,000,000 in any calendar year. At the same time, individual contributions or loans for use in any campaign for the nomination or election of federal officers were restricted to \$5,000 each in any calendar year.

At its first test (in the elections of 1940), however, the portion of the law relating to contributions and expenditures proved so full of loopholes, arising from vague phraseology and specified exceptions, that its practical effect was almost negligible. In the case of Republicans and Democrats alike, mushroom organizations, acting independently of the regular national committees, collected and expended sums which, as we have seen, pushed the total outlay of each party far beyond \$3,000,000;¹ and persons who had contributed or loaned \$5,000 to a national committee made even heavier contributions to state committees, which then used the funds for expenses previously assumed by the national committee.² So disappointing, indeed, were the results that some members of Congress urged total repeal of the legislation as a demonstrated failure. Even the sponsor from whom it took its name came out with a proposal, not only for repeal, but for limiting the outlay of every party in a national campaign to one million dollars and having the federal government itself furnish the funds. As in the case of the famous Volstead Act of 1919 dealing with the enforcement of national prohibition, public opinion was simply not sufficiently crystallized in support of the legislation to demand or uphold even ordinary or routine efforts to make it effective; and, broadly, this unpleasant observation holds true of the regulation of political finances in nearly all of their aspects.

Their
ineffec-
tiveness
in limit-
ing expen-
ditures

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¹ Keeping well within the Hatch Act's limits, however, the Republican national committee reported an expenditure of only \$2,242,272 and the Democratic committee an outlay of only \$2,197,816. On the Republican side, the Associated Willkie Clubs of America alone acknowledged an outlay of \$1,356,604.

² For example, the Rockefeller, Du Pont, and Pew contributions reported amounted to over \$354,000. For a general discussion of the evasions of the act, see L. Overaker, "Campaign Finance in the Presidential Election of 1940," cited above.

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CHAPTER XII

NOMINATIONS AND ELECTIONS

At appropriate points in later chapters, attention will be given to the methods of filling particular types or classes of elective offices; the very next chapter, indeed, tells of the nomination and election of the nation's president. It will be useful, however, to undertake a general survey of our nomination and election procedures here and now, while our discussion of voters and parties is fresh in mind.

- * (The first discovery that one makes is that the ways in which candidates for public office shall be presented to the voters, and the manner in which the voters shall register their preferences on election day, are matters that have been left almost entirely to the states, with the result
^ that each state has practically a free hand in developing its own electoral machinery. To be sure, the constitution gives Congress authority to make laws or to alter state laws, regulating "the times, places and manner of holding elections for senators and representatives";¹ and in pursuance of this power the national legislature has ordained (1) that presidential electors, representatives, and senators shall be chosen on the Tuesday after the first Monday in November,² and (2) that representatives shall
x be elected by secret ballot.) In addition, it has banned corrupt practices and restricted candidates' expenditures at elections in which federal officials are chosen. Prior to 1941, the Supreme Court was on record to the effect that the power of Congress over elections did not extend to primaries. This judgment has now been reversed, and congressional action bearing upon the nomination of senators and representatives may not unlikely be taken.³ As yet, however, machinery set up and maintained by the states is employed, with virtually no restrictions except those mentioned, in choosing presidential electors and in both nominating and electing representatives and senators no less than governors, members of state legislatures, and municipal councilmen. Even the great national nominating conventions that select our presidential candidates are,
• in so far as they have been subjected to legal regulation at all, affected only by state laws, chiefly governing the methods of choosing delegates.

Same machinery used for both national and state purposes

¹ Except as to the places of choosing senators. See Art. I, § 4, cl. 1.

² Unless the constitution of a state fixes a different date, Maine is now the only state in which this is the case; congressmen, as well as other officers, are there elected on the second Monday of September.

³ After 1842, representatives were required also to be elected by districts, and from 1901 until 1929, the districts were variously required to be "compact," formed of "contiguous" territory, etc. See p. 253 below.

• ⁴ See p. 170, note 2, above.

State
codes of
electoral
law

The election laws of most states make up a rather sizeable volume, which few people ever have the courage to study. Nevertheless, the character and provisions of these laws are matters of vital importance to citizens generally; for the ballot-box is the only point at which most people can exercise any genuine control over their government. However virtuous, public-spirited, conscientious, and well-intentioned a citizen may be when he goes to the polls, these good qualities or intentions may be rendered of no effect by poorly drawn and inadequate election laws, or by dishonest or incompetent officers, or by a long and confusing ballot. Such things, therefore, as the form of the ballot, the choice, qualifications, and duties of election officers—in fact, the provisions of election laws generally—are not to be passed over as the “mere mechanics” of popular government. They are, rather, matters which pertain to the very essence of such government.

The Nomination of Candidates

Importance
of the
nomi-
nating
process

In any outline of an electoral system, the method of designating candidates is the first phase or stage calling for attention. To be sure, the making of nominations is, in a sense, only a preliminary incident in the realization of a political party's ultimate objective, *i.e.*, winning control of the government. It is, nevertheless, of prime importance; because whether we have honest and efficient elected officials naturally depends upon the character and qualifications of the persons who receive nominations. Particularly true is this in not a few of our states where nomination by one party is usually equivalent to election, *e.g.*, in such one-party states as Vermont and most of the Southern states; also in such cities as Boston and Philadelphia.

Develop-
ment of
regu-
lation

In earlier days, when political parties were looked upon as private rather than as public organizations, nominations were regarded as strictly their own affair, and their methods of making them as a matter with which legislatures properly had nothing to do. As a result, nomination procedures went almost wholly unregulated by law; and individuals who desired to announce their candidacy independently of any party action were equally exempt from control. For many years now, however,—more particularly since the rise of the direct primary early in the present century—the nomination of candidates has rightly been regarded as falling within the field of legitimate state regulation. No longer are political parties looked upon as simply private organizations; rather, they are regarded as public institutions whose operations in other respects than nominations may also be controlled by law; so that now one finds in most states laws which seek to regulate almost every phase of party activity, including, as we have seen, the structure and functions of what is commonly called party machinery and the raising and spending of money in connection with political campaigns.¹

¹ See article by J. R. Starr cited on p. 198 above.

The earliest formal device for choosing candidates for principal state offices, and also for Congress, was the legislative caucus, each party delegation in the state legislature canvassing the matter in conference when an election approached and deciding upon a slate of candidates to be "recommended" to the voters. As will be pointed out below, candidates for the presidency were for a time selected similarly by party caucuses in Congress.¹ Already, however, there had arisen a caucus of different nature—a more or less informal, sometimes secret, meeting of party leaders for selection of candidates for local offices in townships and cities. Frequently, too, these gatherings designated some of their number to confer with representatives of similar caucuses in the choice of candidates for county offices or for offices in larger areas; and eventually it became the customary thing for delegates to be chosen in local caucuses, in accordance with some definite plan of representation, to attend a formal county nominating convention. The next step was the supplanting of the legislative caucus by a state-wide convention for nominating to state offices and to Congress, and, in the national field, by a national convention to select candidates for the presidency. By 1835, and for upwards of eighty years thereafter, the representative convention was the almost universal device for naming party candidates for all offices above those of townships and other subordinate local areas.

Nomi-
nating
methods

Rise of
the con-
vention
system

At its advent, the convention system was hailed as a decided improvement upon earlier nominating devices, as indeed in many respects it was. Strongest of the arguments for it was that it applied to the selection of party candidates the principle of representation upon which all government in America was grounded. Theoretically, the voice of each voter could be transmitted from delegate to delegate until it found expression in the party's duly chosen nominees for legislative, executive, and judicial offices. And to this day, party leaders, as a rule, look upon the convention system as the ideal mode of selecting candidates. In their eyes, it furnishes an unexcelled opportunity for perfecting their party organization, for bringing into the open the party's strength or weakness in various portions of the state or district concerned, for appraising the popularity of rival aspirants for nomination, for arousing party enthusiasm, for conciliating factions by agreeing upon "balanced" or compromise tickets, and for drafting and adopting party platforms.

Argu-
ments
for the
system

But, however admirable in theory, the convention system in practice was soon found to afford little or no protection against boss or machine control of nominations. In many states, men who represented the best type of citizenship were seldom chosen as delegates; and when chosen, they often turned over their credentials to "proxies" named by party or factional leaders. Conventions became the "market-place of politics," where political "trades" were consummated by the purchase, sale, or transfer of delegates from one candidate to another; convention pro-

The
system's
decline

¹ See pp. 222-223 below.

ceedings were often marred by serious disorder and fraudulent practices; and in the larger states the system became so complicated that ordinary voters were unable to exert any appreciable influence upon the selection of the candidates put forward by their party.¹ Chiefly for these reasons, a few states—notably New York and Indiana—have restricted the operation of the convention system to the nomination of candidates for the principal state offices; and since about 1903, the great majority have abolished the system outright, not only for congressional and state offices, but also for county and municipal positions.² In its place, the direct primary system has been adopted, in one form or another, in all but two states (Connecticut and Rhode Island), although it, too, is not without shortcomings.³

The
direct
primary

Under the direct primary method, candidates are nominated directly by the voters of each party, instead of indirectly through delegates assembled in convention. The primaries of the different parties are usually held on the same day, and at the places where the regular elections are held later on; they are presided over by the regular election officials, and are surrounded by practically all of the formalities and safeguards attending a regular election; and hence the appropriateness of the full name for the system, *direct primary election*. The ballots are generally printed at public expense, and are usually of uniform size and shape. Persons seeking a party nomination to any office, as a rule, get their names on the primary ballot by filing petitions signed by a specified number of qualified voters, the number being roughly proportioned to the importance of the office sought, and varying all the way from one-half of one per cent up to ten per cent.⁴ Usually a candidate who receives the highest number of votes for a given office is declared the party nominee for that office, even though, where three or more persons are seeking the same nomination, this may result in selection by considerably less than a majority. Nine Southern states⁵ and Utah require a majority vote to nominate; if no

¹ For a fuller discussion of the rise and defects of the convention system, see M. Ostrogorski, *Democracy and the Party System* (New York, 1910), Chaps. II-V, VII; E. C. Meyer, *Nominating Systems* (New York, 1902), Pt. I, Chap. v; F. W. Dallinger, *Nominations for Elective Offices in the United States* (New York, 1897).

² In some cities, candidates for municipal offices are nominated by the simple method of filing a petition signed by a specified number of qualified voters. This is true in San Francisco, Cleveland, Boston, Pittsburgh, and a number of New Jersey cities.

³ The first state to enact a direct primary election law was Wisconsin, in 1903. See A. F. Lovejoy, *LaFollette and the Establishment of the Direct Primary in Wisconsin, 1890-1904* (New Haven, 1941).

⁴ California, in 1927, simplified the primary system by substituting for petitions signed by a large number of voters declarations of candidacy signed by "sponsors," the number ranging from ten to twenty for the lowest offices up to from sixty to one hundred in the case of the highest offices. In 1933, Massachusetts sanctioned the holding of pre-primary conventions, though the law was repealed in 1937. Such conventions are authorized also in Colorado. Similar laws in Minnesota and South Dakota were repealed in 1923 and 1929, respectively. Cf. C. Kassel, "Resolving the Political Chaos; A Study of the Pre-Primary Nominating Convention," *South Atlantic Quar.*, XXXVIII, 198-211 (Apr., 1939).

⁵ Mississippi, Texas, North Carolina, South Carolina, Georgia, Louisiana, Florida, Alabama, Arkansas.

candidate obtains a majority in the primary, a second, or "run-off," primary is held, in which only the two highest candidates are voted for.¹ The right to participate in making party nominations is commonly restricted by law to persons able to comply with some kind of a test of party allegiance. Primaries so conducted are called "closed" primaries, to distinguish them from the "open" primaries found in Minnesota, Washington, and six other states, where no attempt is made to prevent Democrats from taking a hand in Republican nominations, and *vice versa*. A number of other states, however, in reality have the open primary, because the tests which they prescribe notoriously fail to prevent voters from shifting temporarily from one party to another. The most effective means of forestalling this practice (called "raiding") are to be found in those states which, like New York, require formal registration or enrollment of the members of each party previous to the day of a primary. At the time of enrollment, various tests are applied in such states to determine the right of voters to register as Republicans or as Democrats, as the case may be; and at the ensuing primary no one is allowed to vote whose name does not appear upon the respective party lists.²

"Open"
and
"closed"
pri-
maries

From what has just been said, it will be seen that the direct primary usually presupposes the existence and activity of national party organizations in state and local nominations. Where, however, non-partisan elections have been introduced, they are usually preceded by a "non-partisan" primary conducted in practically all respects like an ordinary party primary, except that the ballots carry no indication of the party affiliations of the candidates; and no attempt is made to inquire into the party preferences of those who wish to participate in naming the "non-partisan" candidates. Partisan and non-partisan primaries may even be held at the same time and place, in which case separate ballots are prepared for the two kinds of nominations. In any event, the two candidates on the non-partisan ticket polling the highest number of votes for each office have their names printed on the official ballot used at the ensuing election, where party designations are again entirely absent. In most places, the non-partisan primary thus becomes "a sort of qualifying heat which eliminates the weaker contestants from the final race," and in so doing insures ultimate election by majority, rather than by a mere plurality.

"Non-
parti-
san" pri-
maries

¹ In Tennessee also a run-off primary is authorized in the case of a tie vote. In order to approximate majority nominations, a number of states have tried the preferential system of voting, under which each voter is given an opportunity to express his first, second, and sometimes his third, choices among the candidates. In Iowa and South Dakota, if none of the candidates for a given office receives thirty-five per cent of the total party vote in the primary, the selection of a candidate for that office is left to the action of a delegate convention. Cf. O. D. Weeks, "Summary of the History and Present Status of Preferential Voting in State Direct Primary Systems," *South-western Soc. Sci. Quar.*, XVIII, 64-67 (June, 1937).

² A great deal of information on these matters will be found in C. A. Berdahl, "Party Membership in the United States, II," *Amer. Polit. Sci. Rev.*, XXXVI, 241-262 (Apr., 1942).

Merits
and
defects
of the
direct
primary

The direct primary method of choosing party candidates unquestionably gives the rank and file of the party a much more direct and decisive influence in controlling nominations than is possible when candidates are picked by delegate conventions. Beyond this point, the supporters and opponents of the direct primary hold widely varying views as to its superiority over the convention system. The former argue that it brings to the polls on primary day a much larger proportion of the voters than took the trouble to come out merely to vote for delegates under the old system; that it has materially weakened machine control of nominations; that it affords at least an opportunity to bring forward better candidates, at all events a better chance to defeat conspicuously unfit ones; and that corruption, which often was a decisive factor in determining the selection of candidates by conventions, is robbed of most of its potency. Opponents of the direct primary, on the other hand, are in the habit of denying outright most of these claims, and of asserting that the direct primary has produced no better officials, involves added costs and therefore leads to increased taxation, imposes greater expense upon candidates, favors candidates with plenty of money to spend, weakens party organization, destroys or impairs party responsibility, intensifies machine control, multiplies the number of candidates, and favors populous centers at the expense of rural sections.

Most of the issues thus raised are largely matters of opinion, and consequently cannot be disposed of by simple assertion one way or the other. With widely diverse laws, results under the direct primary have naturally varied from state to state, and even from time to time and place to place within the same state. The only proper method, therefore, by which to appraise the system is that of comparing results under it, state by state, with conditions which prevailed in the same states under the convention system. Perhaps the primary's chief shortcomings arise from the failure of the laws regulating it to take into account the fact that democracy needs leadership, and their neglect to provide for a leadership (although this can hardly be made simply a matter of law) that is at once public, official, and responsible. Until guidance of this sort supplants the more or less secret, unofficial, and irresponsible leadership that has sprung up in most of our states and large cities, and until the number of offices for which popular nominations have to be made is greatly reduced, the best results logically to be expected from the direct primary will never be attained.¹

¹ A digest of state primary laws (not, of course, up to date) will be found in *Annals of Amer. Acad. of Polit. and Soc. Sci.*, CVI (Mar., 1923). Significant later changes are summarized in notes by L. Overacker in *Amer. Polit. Sci. Rev.*, XXIV, 370-380 (May, 1930); XXVIII, 265-270 (Apr., 1934); XXX, 279-285 (Apr., 1936); and XXXIV, 499-506 (June, 1940). The principal treatise on the subject is C. E. Merriam and L. Overacker, *Primary Elections* (New York, 1928).

Election Machinery and Processes

In early days, when the voters in a village or other district were few and well known to one another, it was possible to get along by merely identifying them as they presented themselves at the polls. But as numbers increased and people moved more frequently from place to place, it became necessary to adopt some plan for enrolling the properly qualified in advance of election day. Hence the rise of varying systems (provided for by law in each state) for preparing and keeping official voters' lists. Such lists, now required in every state, are used in both primaries and elections, and no one whose name does not appear on them is permitted to vote, at all events unless certain special formalities prescribed by law are complied with. All but three states (Vermont, Arkansas, and Texas) have personal registration, in the sense that one who desires to vote must appear in person before the proper registration official at a county seat or other designated place and establish his right by giving whatever information and assurances the law requires. In a majority of states until recently, registration has been periodic, which meant that the voter might keep his name on the list only by re-registering at yearly or other fixed intervals; and many still think this the surest method of keeping the lists free from the names of persons who have died, moved away, or for any reason become disqualified. A good deal of inconvenience, however, is caused the voter; many fail to register; and twenty-two of the states have now introduced state-wide plans for "permanent" registration, under which a voter, once registered, remains on the list as long as it is not discovered that he should be removed. With all of the names arranged conveniently on cards or loose-leaf sheets, registration officials, who, in addition to whatever other duties they may have, are prepared to give attention to registration matters the year around, keep ceaselessly revising the lists as new voters report for registration and old ones drop out. Whatever plan may be in use, the task of guarding against fraud is a difficult one, and the officials in charge need to be persons not only of intelligence but of high integrity; honest registration is the first line of defense against corrupt elections.¹

Regis-
tration
of voters

Still other preliminary work is necessary before an election can be held. A division of the voters, on geographical lines, must be worked out, so that each will be able to vote in his proper district or precinct—which in rural regions may be a fairly large area, but in towns and cities is likely to be a ward or some subdivision thereof.² Polling places

Further
prepara-
tions for
elections

¹ The principal work on the subject is J. P. Harris, *Registration of Voters in the United States* (Washington, 1929). The author suggests a model registration system; and such a system is outlined in a supplement to the *National Municipal Review*, XVI (1927). Cf. J. B. Johnson and I. J. Lewis, *Registration for Voting in the United States* (Chicago, 1941); J. K. Pollock, *Permanent Registration of Voters in Michigan* (Pamphlet, Ann Arbor, 1937); and J. P. Horlacher, "The Administration of Permanent Registration in Philadelphia," *Amer. Polit. Sci. Rev.*, XXXVII, 829-838 (Oct., 1943).

² It is not to be understood that these arrangements are made afresh for every election, although changes may be fairly frequent.

must be designated, with preference in these days for school-buildings, police and fire stations, and other locations of a little more dignity and attractiveness than the livery stables, barber shops, and other places commonly employed before the feminine touch was added to our politics. Polling officers must be appointed, commonly on a bi-partisan basis and from residents of the precinct; polling hours and places must be duly advertised; sample and official ballots must be printed and distributed; other polling equipment, down to lead pencils, must be made ready. In large cities, these functions are performed as a rule by special election boards, appointed by the governor or otherwise; elsewhere, they commonly fall to county authorities, such as boards of supervisors or commissioners. Few people realize the magnitude of the preparations entailed in a major city or even a populous county.

Polling
officials

On election day, the polls in each district or precinct are in charge of the polling officials previously appointed. Varying in number, titles, terms, method of selection, and rate of compensation—from state to state, and even in different parts of the same state—such officials usually include an inspector, who has general charge; two judges, who help decide disputes; two or more clerks, who have custody of the voters' lists, initial, number, and pass out the ballots, and check off the voters to whom ballots have been issued; and as a rule one or two police officers, although the duty of quelling possible disturbances and maintaining general decorum may be left to regular sheriffs' deputies or police. Not strictly as election officers, but with a view to looking after party interests, recognized party organizations, and even individual candidates, are allowed to have present "watchers" or challengers, who are entitled to see everything that is done by the election authorities at both the casting and the counting of the ballots. Their main function, of course, is to detect illegal voting which otherwise might somehow escape the officials. At first glance, the duties of polling officers may seem so simple and so purely clerical that almost any person can perform them. Certainly this is the theory on which the officials are nowadays too often selected; in many places, the posts are simply distributed by local politicians among their friends as political favors. Full knowledge of the election laws—no simple matter—ought, however, to be possessed, as well as the intelligence and judgment necessary to deal satisfactorily with doubts and controversies which almost inevitably arise. The electoral system could be considerably improved by raising the standard for polling officials, possibly by the use of qualifying examinations, such as were authorized in Milwaukee in 1937 and in Minnesota in 1940. Circulars of instructions are generally distributed in advance to persons who are to serve, but that is about as far as present precautions go.¹

When, on election day, the voter enters the polling place, he takes

¹ See M. H. Shusterman, "Choosing Election Officers," *Nat. Mun. Rev.*, XXIX, 188-193 (Mar., 1940); *Mun. Year Book* (1941), 532.

his turn in identifying himself to the clerks, carries a blank ballot to a screened compartment, or "booth," marks the ballot according to his preferences, and, emerging, folds the ballot with its number and the clerk's initials on the outside, deposits it in the ballot-box, and is duly checked off as having voted. Under only one circumstance may his privacy in the voting booth be invaded: if on account of blindness, illiteracy, or other handicap, he asks for assistance, one clerk of each party may, under the laws of most states, enter the booth to give it, although without trying in any way to influence his decisions.

Casting
the
ballots

But not all voters are so situated, at a given election, as to be able to present themselves at the polls. The number who cannot do so is, of course, particularly large in wartime; and as far back as the Civil War, provision (although not very effective) was made for soldiers to cast their ballots *in absentia*. In addition to soldiers and sailors, there are, however, the ill and the disabled, students in attendance at distant colleges and universities, persons engaged in operating trains, migrant workers, people away from home on business trips, and many other persons "unavoidably" or "necessarily" absent (as the laws put it) from their voting precincts at election time. Vermont led off in 1896 with a statute making general provision for absent voting, and by 1940 all states except Kentucky and New Mexico had laws of the kind,¹ although applying to somewhat differing categories of people and in some instances to all elections and in others only to certain ones.²

Absent
voting

With over five million men (and a good many women) of voting age in training camps or overseas, and with hundreds of thousands of both men and women moving, or likely to move, from one part of the country to another in quest of employment in war industries, the country was faced, as the congressional and state elections of 1942 approached, with a weighty problem. Notwithstanding that the federal constitution leaves mainly to the states the fixing of qualifications for voting, and intrusts to them entirely the preparation, distribution, collection, and counting of ballots, Congress, in 1942, passed a measure facilitating absent voting by members of the armed services and their auxiliaries, wherever located, and without reference to registration or payment of poll taxes. In the elections of that year, only some 136,000 such persons applied for ballots, and only 28,000 actually voted. By 1944, the number of men and women of voting age in the armed services had risen to approximately nine million; and, with a presidential election approaching, more adequate ar-

Voting
in the
armed
services
during
World
War II

¹ New Mexico was authorized by its constitution to enact such legislation, but had not yet done so.

² See J. K. Pollock, *Absentee Voting and Registration* (Pamphlet, Washington, D. C., 1940), and cf. *State Absentee Voting and Registration Laws, Sept., 1942* (Washington, D. C., Govt. Prtg. Off., 1942). The absentee voter must apply to the proper official for the privilege, and after receiving his ballot (directly or through an official in charge of elections where the voter is) must usually validate himself before a notary or other official before marking his ballot and mailing it to the proper address.

rangements for soldier voting became imperative. Instead, however, of passing a measure, such as President Roosevelt favored, under which the entire matter would have been taken care of in accordance with a simple, uniform federal law, Congress fell into prolonged and angry debate, ostensibly over the constitutionality of such a plan, but animated chiefly by bitter feeling over the poll-tax issue and by partisan interpretations of the effect that different plans might have upon electoral results. The upshot was an act of March, 1944,¹ providing for a federal "short ballot" for use the following November in voting for president, vice-president, senators, and representatives, but hedged about with restrictions permitting such a ballot to be employed only (1) by service-men voters from states having no system of absent voting and (2) by those applying for a ballot from their home state by September 1 but failing to receive it within a month. In deference to states' rights, poll-tax qualifications were left untouched; and, on the same line, service men were not to be eligible to vote the federal ballot unless by July 15 their respective states should have indicated their willingness to receive and count any federal ballots cast and returned to them. In other words, ballots supplied by the states (in accordance with new or revised laws which many of them were in process of enacting) were to have the right of way, even overseas, with the federal ballot merely opening a somewhat uncertain opportunity for voting in cases where state ballots were not available. Regarding the plan as confusing and "wholly inadequate," although better than no provision for a federal ballot at all, President Roosevelt simply permitted the measure to become law without his signature.²

The outcome was a considerably heavier soldier vote than expected. A total of some 4,300,000 service men and women applied for ballots—probably rather more than half of those eligible to do so—and the total vote cast was in the neighborhood of 2,800,000.³ In most states, the soldier ballot (state or federal) must be received by election day, November 7, in order to be counted. In eight, however, election officials were authorized to receive and count belated ballots up to a varying deadline—in one or two instances as late as the first week of December. These eight states had a total of 103 electoral votes, and in a close election the country might not have known for a month who the next president was to be. As matters actually turned out, the reelection of Franklin D. Roosevelt was assured by the balloting of November 7.

¹ *Public Law 277, 78th Congress.*

² The federal government undertook to transport and deliver all ballots, federal and state, although Army officials warned that insufficient time had been allowed for reaching voters in some remote areas. For supervising the federal government's participation in the general task, a War Ballot Commission was set up, consisting of the secretaries of war and navy and the head of the War Shipping Administration. Under direction of this agency, both the Army and the Navy assumed the burden of providing instruction for eligible voters in the intricacies of voting procedures under existing state laws.

³ Only twenty states allowed federal ballots to be counted, and the number of federal ballots cast was only 109,479.

Not all elections involve the literal use of ballots. There is an ingenious contrivance known as a voting machine; and more than half of the states have authorized some use of it.¹ Where such machines are employed, the voter identifies himself at the polls in the usual way, but instead of receiving a printed ballot, is directed to a curtained space in which stands a mechanism showing on its face the candidates' lists which the ballot would contain if one were used, and where he votes by merely pulling levers—a single master lever if voting a straight ticket. Automatically recording the votes, and also adding them up, the voting machine has the great advantages of accuracy, complete secrecy, economy of time, and full tabulation of results the moment the polls are closed. Aside from hesitancy to adopt new ways, and perhaps in some cases the lukewarmness of politicians toward a device that cannot be manipulated,² the main obstacle to wider use of voting machines is the cost of the machines themselves—something like a thousand dollars apiece. Use of them in more populous areas is, however, steadily growing.³

Voting
ma-
chines:

When the polls close, the results are canvassed and tabulated, usually by the regular polling officials, although about a dozen states, including Iowa, Kansas, Nebraska, Missouri, and West Virginia, have a "double election board" system under which the "receiving board" has charge of the polling and a "counting board" confines its labors to reckoning up results, usually starting its work while the voting is still going on.⁴ If voting machines are used, there is little to be done except to open the machines and find what they have recorded. In the majority of cases, however, there are printed ballots to be counted—perhaps a huge number of them; and the authorized persons attack the job—sometimes, as in New York, in the presence of any voters who care to look on, but usually with only the polling officials present. The task completed, all ballots, used and unused, including spoiled and defective ones, together with the poll-books and tally-sheets, are placed in sealed packages or in sealed ballot-boxes; and all are preserved and carefully guarded for a specified period, after which the ballots are destroyed. Meanwhile, the chief election officer sees that "return blanks" are filled out in duplicate or triplicate, showing the exact number of votes received by each candidate; and, his signature having been affixed, one set is sent off to the city or county clerk or to a board of elections, while another goes to some higher canvassing authority, *i.e.*, the county board of supervisors in California and other states, the judges of the court of common pleas in Pennsyl-

Tabulat-
ing and
reporting
the
results

¹ In 1940, voting machines were employed in all New York cities, and in certain places in eighteen other states, including Philadelphia, Pittsburgh, Indianapolis, San Francisco, and Los Angeles.

² This is not to say that voting machines have never been tampered with. But in their improved forms they are fairly secure against that sort of thing.

³ J. P. Harris, *Election Administration in the United States*, Chap. vii; S. D. Albright, *Ballot Analysis and Ballot Changes Since 1930* (Chicago, 1940), 18-23.

⁴ L. McCarthy, "Counting Votes Before the Polls Are Closed," *Amer. Polit. Sci. Rev.*, XLIX, 784-788 (Nov., 1925); J. K. Eads, "Indiana Experiments with Central Ballot Count," *Nat. Mun. Rev.*, XXIX, 545-548 (Aug., 1940).

vania, the county clerk assisted by two justices of the peace of the county in Illinois, and the board of election commissioners in most large cities. By telephone, or otherwise, the results are reported to the press and party leaders the moment they are ascertained; and, consolidated with others pouring in from all over the electoral area, they enable an interested, and perhaps excited, public, hovering before radio sets and loud-speakers, to know how things are coming out.

Final
stages
of the
count

On a day fixed by law, the canvassing bodies in each county or city proceed officially to add up all the votes cast and, in so far as state and national offices are involved, certify the result to some state official (usually the secretary of state), who is required to consolidate and transmit the returns to a state canvassing board. In New York, this board (as reorganized in 1927) is a bi-partisan body consisting of the attorney-general acting as chairman, two senators chosen by the senate, and two members of the assembly chosen by that body. In Illinois, the board is made up of the governor, the secretary of state, the auditor, the treasurer, and the attorney-general. These state boards, in turn, add up and check over the results reported from the several counties. The last stage in the process is reached when the state and county canvassing boards file their reports with the officials designated by law, usually the county clerk in the case of county offices and the secretary of state in the case of state (and national) offices; whereupon these officials issue to each person declared elected a certificate of election which is *prima facie* evidence of the legal right of the person named therein to hold the office and perform the duties connected with it.

Disputed
elections

Such a certificate is not, however, conclusive; for all state election laws include detailed provisions for "contested elections," that is, for disputes arising when a defeated candidate alleges that he has been illegally denied a certificate of election. Such cases are commonly determined in the courts, although in some states, *e.g.*, Illinois, the legislature is the authority which decides conflicting claims to the highest state offices. Where such contests involve the right to a seat in the state legislature or in a city council, the legislative house or the council concerned almost invariably has the power of decision.

Forms of Ballots

The
Austra-
lian
system
adopted

In sharp contrast with the days when voting was oral and public,¹ secrecy is now everywhere provided for, either in the state constitution or by statutes; and it has been effectually attained through the adoption since 1888 of the so-called Australian ballot in every state except South Carolina.² Written or printed ballots, to be sure, were in general

¹ A description of oral voting, in a Virginia election in 1799 is quoted in P. E. Odegard and E. A. Helms, *American Politics*, 705.

² In that state there is no statute requiring use of the Australian ballot. The Democratic party, however, requires its use in its own primaries—which, in a one-party state, almost invariably predetermine the results of elections.

use by the middle of the nineteenth century. As employed then, however, they gave the voter little protection. Prepared and distributed in advance by candidates or by party organizations, they usually could readily be identified, by color or otherwise, when carried to the polls to be deposited. The essence of the Australian system is that the only ballots allowed to be used at the polls are prepared by responsible public officials at public expense, in accordance with forms prescribed by law, and hence can be cast without possibility of detection of the ticket for which one has voted. The ballot is normally in blanket form, i.e., bearing on a single sheet the complete list of offices to be filled and of candidates, although when national, state, and city elections are being held simultaneously, the names of candidates for presidential electors, and also of candidates for municipal offices, are sometimes printed on separate sheets.¹

The arrangement of the names of candidates on the ballot varies in different states, but usually conforms to one or the other of two major plans. In the party-column type of ballot, introduced in Indiana in 1889, and now used in thirty states, candidates of the different parties have their names printed in separate columns, at the head of which appear, in each case, the party name and a "party circle" or "party square," and sometimes a party emblem, or vignette. The voter has merely to place a single cross in this circle or square to vote for all of the candidates of a given party. This obviously facilitates what is called "straight-ticket" voting, and accordingly the plan is regarded with high favor by party leaders. Wyoming and a few other states, although retaining the party column for the guidance of voters, omit the party square or circle at the head of the column, so that there is no possibility of voting a straight ticket merely by making a single cross.

Principal
types of
ballots

In seventeen states,² including Massachusetts and New York, a different arrangement is employed—an "office group" scheme which puts less stress on party regularity and more on the weighing of individual candidates. The names of candidates of all parties are grouped together alphabetically according to the offices for which they are running, the designation of the party to which each candidate belongs appearing alongside his name. There is no way of voting a straight party ticket with a single cross; on the contrary, to vote a straight ticket, a voter must place a cross opposite the name of every candidate of a given party. For this reason, the Massachusetts type of ballot, as this form is called (because it was employed first in that state, in 1888), is said to favor

¹ In South Carolina, the voter simply selects a "party paper" from among those circulated by party officials and workers. Georgia was the last state to adopt the Australian plan (1922), with, however, use of it still optional with the counties. Voting machines, where employed, represent merely a new technical adaptation. See E. C. Evans, *A History of the Australian Ballot System in the United States* (Chicago, 1917); S. D. Albright, *Ballot Analysis and Ballot Changes Since 1930* (Chicago, 1940).

² The missing state in the figures here given is, of course, South Carolina.

independent, or "split-ticket," voting. Pennsylvania ballots retain the grouping of candidates by offices, as in Massachusetts, but also provide in the left-hand margin a list of the parties represented on the ballot; and a single cross placed opposite one of these party names is counted as a vote for every candidate nominated by that party—a device which, of course, makes straight-ticket voting quite as easy as where the party-column ballot is employed.

The Election System Criticized—Proposed Changes

Few aspects of our governmental system have, in recent years, been regarded as more faulty than our scheme of elections, especially as to the frequency of primaries and elections, the holding of local, state, and national elections simultaneously, the excessive number of offices filled by popular election, and the almost universal practice of election by plurality vote. Each of these grounds of objection deserves a word of comment.

1. Fre-
quency
of elec-
tions

Concerning the frequency of elections, nothing more need be said than to call attention to the familiar fact that the election of president and vice-president and of various officers of different states occurs every four years; that some state officers are elected triennially, and others, along with congressmen and most county officers, biennially; that many county and local offices are filled annually; and that practically all of these elections are preceded by primaries or nominating conventions. Not only do these frequently recurring primaries and elections impose a heavy financial burden upon the taxpayers,¹ and give more scope than is desirable to the professional politician, but they make it impossible for the average preoccupied citizen to keep up an intelligent interest and to take an active part in the nomination and election of the men who in various ways act for him in the conduct of public affairs.

2. Con-
currence
of
national,
state,
and
local
elections

National, state, and local elections often fall on the same day, with the result that the names of candidates for offices of all three kinds, or at least for national and state offices, are not infrequently printed on the same ballot. This tends seriously to confuse national with state and local issues, commonly to the detriment of state and local government. A remedy has been sought in many states by arranging elections so that the most important state and local contests will be held in years in which presidential and congressional elections do not occur. Some states, indeed, have not stopped there, but have also separated purely local from state elections. Separation on this line may, however, be carried so far as unreasonably to increase the number of elections occurring in a single year, as has happened in Illinois, where in some years the voters are called to the polls as many as seven times.

¹ On the cost of elections, see J. P. Harris, *Election Administration in the United States*, Chap. x. Cf. pp. 192-194 above.

Of far greater seriousness than either of the foregoing defects is the long and confusing ballot with which most voters are confronted when they go to the polls at presidential elections and at many state and local elections as well. The bewildering list of candidates to be voted on is accounted for partly by the number of offices now filled by popular election, partly by national, state, and local elections falling at the same time, and partly by the fact that there are usually two or more candidates for every office to be filled. The result is that ballots bearing three hundred, and even more than four hundred, names are by no means uncommon.¹ Certain serious consequences are entailed. For one thing, it is extremely difficult, if not impossible, for a majority, or even a considerable minority, of the voters to form an intelligent opinion as to the merits of the candidates, especially when elections take place frequently. Consequently, there is a great deal of blind voting, especially in the form of straight-ticket voting. Another result is that the merits of the candidates for only a few principal offices are considered seriously, even by well-informed voters. Popular interest is usually concentrated upon candidates for president, governor, and mayor, to the almost complete neglect of the remainder of the ticket. At best, in other words, there is intelligent voting for a few prominent offices, and blind voting for the great majority of minor offices. Taking advantage of popular preoccupation with the most conspicuous offices, politicians are often able to get wholly unfit candidates into minor, though not unimportant, positions.

3. The long ballot

The remedy for much of this blind voting is to shorten the ballot by sharply reducing the number of elective positions.² Officers who have a share in translating public opinion into law, or who enjoy large discretionary powers in the administration of laws—in other words, all policy-determining officials—should continue to be elective. But there are surprisingly few of these. The president, the members of both branches of Congress, the governor and members of the state legislature, and the mayor and members of the city council are obviously policy-determining officers. To a less extent, the same is true of boards of county commissioners or county supervisors. But here the list practically ends; very few

Need for curtailment

¹ In addition, in states in which the popular referendum prevails, anywhere from two or three to a dozen or more legislative measures may be submitted to the voter's judgment. A few years ago, Indiana had the dubious distinction of having the largest ballot of any state—a total of fourteen square feet! "Blanket ballots," carrying all the offices and all initiated and referred measures, are used in twenty-five states; elsewhere there are separate ballots for offices and measures, and occasionally also for offices on different levels of government.

² A few states have to some extent done this. Thus New York, as long ago as 1925, adopted a constitutional amendment making the offices of secretary of state, state treasurer, and state engineer appointive, and three years later Virginia did the same thing for the offices of secretary of state, state treasurer, commissioner of agriculture and immigration, and superintendent of public instruction. The national government presents no problem at this point, except in the sense that the names of candidates for presidential elector help clutter up the ballot unless printed separately, or unless, as in seventeen states, they do not appear at all.

Officers
that
should be
appoint-
ive

other officials have anything to do with the formulation of public policy in the field of either legislation or administration. On the contrary, their respective official duties are set forth minutely in the national or state constitution or statutes, or in the city charter and ordinances; so that all that they have to do is to study the laws relating to their positions, do what the laws require of them, and do it in the manner prescribed. In this category fall such officers as secretary of state, state engineer and surveyor, state superintendent of public instruction, state treasurer or comptroller, county auditors or comptrollers, sheriffs, county clerks and court clerks, city clerks and city treasurers, and a host of others whose candidacies now encumber our ballots. Choosing them by popular election yields no advantage which is not more than offset by the evils traceable to the resulting lengthening of the ballot. Although it is customary to sneer at the political experts called professional politicians, they are nevertheless indispensable so long as we continue to identify multiplicity of elective offices with genuinely democratic government. But the fact is that many, if not most, of our elections now mean little more than the ratification of one or the other of two slates of candidates previously arranged by irresponsible and unofficial party managers, operating more or less in secret.

The recent adoption of commission and manager government in several hundred cities has been accompanied by a noteworthy reduction in the number of elective municipal officers, and thus has familiarized many voters with the advantage of a shorter ballot. In state and county governments, on the other hand, comparatively slight progress toward a shorter ballot has been made. This is accounted for partly by the fact that constitutional amendments are necessary before many offices now on an elective basis can be made appointive; it is explained in part also by the unrelenting opposition of most professional politicians to changes that obviously would materially lessen their importance and power.¹

4. Plu-
rality
elections

The
prefer-
ential
ballot

The last of the several criticisms of our system of elections mentioned above is directed against the plurality rule in deciding elections. Whenever there are three or more candidates for the same office, the successful one—that is, the one receiving the most votes—is very likely to have been elected by only a minority of the voters. This seems inconsistent with the commonly accepted theory that in a democracy the majority rules. In national, state, and county elections, practically nothing has been accomplished toward remedying the situation. In city elections, however, a partial solution has been found in “preferential” voting. Since 1909, more than fifty cities have done away with primary elections and have substituted nomination by petition, followed by the use

¹ G. W. Spicer, “Relation of the Short Ballot to Efficient Government and Popular Control,” *Southwestern Polit. and Soc. Sci. Quar.*, XI, 182-192 (Sept., 1930); J. K. Pollock, “New Thoughts on the Short Ballot,” *Nat. Mun. Rev.*, XXIX, 18-20 (Jan., 1940).

of a preferential ballot on election day.¹ On this ballot, names of candidates are grouped by offices, as in the Massachusetts type of ballot, and the voter may indicate his first, second, and other choices. If any candidate is found to have received a majority of the first-choice votes, he is forthwith declared elected. If no one has a majority, the result is usually determined by adding the second-choice votes to the first choices. If even then no candidate has a majority, to the first- and second-choice votes are added the third choices, and the candidate who now has the *highest* number is declared elected. In behalf of preferential voting, perhaps the most impressive claims advanced are (1) that, by giving each voter a much wider range of choice among candidates, it tends to emphasize issues rather than personalities, and thus to eliminate personal attacks and recriminations, and (2) that it obviates the necessity of bringing the voters to the polls on two different days, thus making it possible to dispense with the cumbersome and expensive primary system. The plan also tends to insure election by absolute majority.²

Another electoral device sometimes brought into play, but with a different objective, is proportional representation. Applicable only to situations in which three or more members of a board, commission, or legislative body are being chosen in each of a number of districts, its object is, not to promote majority election of any party group in a district as a whole, but rather to open a way for the district's quota of seats to be distributed among the various candidates in approximate proportion to the votes polled by each. No state has seriously considered adopting the plan. But eleven cities, of various sizes, are using it—although the prospect for further adoptions is obscure.³

Proportional
representa-
tion

Holding Public Officials to Account—The Recall

By whatever road public officials reach office, it is essential that there be means of holding them responsible to the electorate, legally as well as morally, and not alone for common honesty and efficiency, but for performing their duties for the benefit of the general public rather than of a political machine, a favored class, or any other special interest. In the case of appointive officials, there is always a possibility of bringing

Means of
enforcing
official
responsi-
bility

¹ Notably San Francisco, Spokane, Portland, Denver, and Columbus. In Cleveland also, the preferential ballot was used for some years previous to the substitution of proportional representation in 1922. In San Francisco, the preferential ballot is no longer used, owing in part to the small number of voters who indicated more than one choice on their ballots, and in part to the adoption of voting machines.

² For an interesting special application of the principal of preferential voting, see H. M. Dorr, "The Nansen System: A Michigan Experiment in Voting" [in Marquette, Mich.], *Papers of Mich. Acad. of Sci., Arts, and Letters*, XXVIII, 613-621 (1943).

³ The eleven municipalities are Cincinnati, Toledo, and Hamilton, Ohio; Boulder, Col.; Wheeling, W. Va.; Yonkers and Long Beach, N. Y.; New York City; and Cambridge and Lowell, Mass., and Marshfield, Ore. The system has been held constitutional in New York (1937) and unconstitutional in Michigan (1920), California (1922), and Rhode Island (1939). For further comment and references, see

* pp. 765-767 in complete edition of this book.

pressure to bear upon the appointing authority to exercise his power of removal. Elective officers, including judges, are almost invariably made subject to impeachment, and in nearly half of the states judges can be unseated by joint action of the legislative houses. Further, in a number of states provision is made for indictment, trial by jury, and removal of specified officers found guilty of grave derelictions of duty. Removal at the hands of the appointing authority is not uncommon in the national government, but in the states the power as vested in the governor and principal local officials is often so hedged about with restrictions as to be almost useless; and, in general, the procedures mentioned fall short of guaranteeing that lively sense of responsibility to the public which is the best insurance against negligence and malfeasance.

The
recall

In 1903, a new device for enforcing responsibility made its appearance in a municipal charter of Los Angeles, *i.e.*, the recall of unsatisfactory officials by direct action of the voters; and during the forty-odd years since the date mentioned, the plan has become a prominent feature of the commission form of city government in most states where that system is authorized, and also, in one form or another, has been extended to state officers in a dozen states.¹ As a rule, it is applied only to officers whom the people themselves elect. On the ground, however, that the conduct of appointive officials is of no less concern to the public, such officials have also sometimes been made subject to recall.

How the
recall is
operated

When a recall movement against some particular official gets under way, a paper setting forth the charges, and known as a "petition," is circulated in a quest for signatures. If the requisite number (varying from ten to thirty-five per cent of the electorate of the area concerned) is obtained, the petition is filed with an officer designated by the law, who, upon finding the document in proper legal form, sets a date—usually thirty or forty days later on—for a "recall election" (unless a regular election is about to take place). If the officer whose recall is sought, seeing the handwriting on the wall, prefers to avoid the stigma of an actual repudiation, he may forestall such action by resigning. If, however—as will usually be the case—he chooses to put up a fight, his name will be placed on the ballot along with the names of any persons nominated (usually by petition) to succeed him. In any event, the election will be carried through in practically the same manner as any other one. If the incumbent under fire polls the largest number of votes, he may consider himself vindicated, and will continue in office. If, however, one of his opponents outstrips him, the latter forthwith assumes the office and fills out the remainder of the term, the incumbent being, of

¹ Oregon (1908), California (1911), Washington, Colorado, Idaho, Nevada, and Arizona (1912), Michigan (1913), Louisiana and Kansas (1914), North Dakota (1920), and Wisconsin (1926). Actually, however, Idaho was without the recall until 1933, inasmuch as the legislature failed for more than twenty years to pass the legislation necessary to make the authorization of 1912 effective. In only eight of the states named does the recall apply to judges.

course, "recalled." A safeguard usually provided is that no petition for a recall election may be filed against an official until he has served for a stipulated period, commonly six months; and as a rule an official cannot be subjected to a recall election more than once during a given term of office.

Bracketed with the popular initiative and referendum,¹ in a period of our political history in which there was a strong public uprising, especially in the West, against bossism and irresponsible government, the recall started off as an extravagantly appraised agency of "direct" democracy. Placing in the hands of the people themselves a procedure which could be invoked easily and carried through regardless of politicians and machines, it seemed a device by which not only could officials of demonstrated unfitness be got rid of promptly, but all officials could be stimulated, from motives of self-protection if others failed, to constant vigilance, industry, and honesty. It was thought, too, that longer terms for office-holders, making for increased experience and efficiency, would now become safe. What of the results? As in the case of the initiative and referendum, the hopes of the reformers have not been fully realized; and it is significant that there have been no new state adoptions of the plan since 1926. To be sure, there is no way of measuring the moral effect upon office-holders of their awareness that the gun is behind the door; the device must be conceded to have value in this way—quite possibly, this is its chief value. But one may be permitted to doubt seriously whether the small number of instances in which the recall has been resorted to by dissatisfied voters represents all the situations in which officials deserved to be ousted. There are no trustworthy statistics on the subject, but it is significant that almost twenty years elapsed after the device first appeared before it was used against any officer chosen by the voters of an entire state. Even yet, there have been only two instances of the kind: (1) in 1921, when the governor, attorney-general, and commissioner of agriculture in North Dakota were recalled because of their connection with developments growing out of the Non-Partisan League movement; and (2) in 1922, when two members of the state public utility commission of Oregon were recalled because of popular dissatisfaction with certain rate increases which the commission had authorized.² Practically all of the remaining cases of recall election have involved officials of municipalities, notably in California.

Scant use of the recall must be attributed, in part, to public inertia. Reflection and experience have shown, however, that the device has inherent defects and limitations. Any satisfactory method of recall must guarantee the accused official a fair trial, based upon full knowledge of the facts by those who render the judgment. Two major difficulties discovered are, first, that recall elections are ordinarily carried on in

The recall in actual use

Some serious limitations

¹ See pp. 757-766 in complete edition of this book.

² One commissioner had been elected by the entire state, the other from a district.

the same atmosphere of partisanship, misrepresentation, and confusion that characterizes other elections; and, second, that the issues, growing out of the official's performance of his duties, are often of too complex and technical a character to be passed upon intelligently by a mixed and preoccupied electorate. Where the uppermost question is the relatively simple one of whether an official has truly represented or reflected the opinion of those who chose him, the recall has undoubted validity; and this may well hold true for members of state legislatures, for city councils and commissions, and for more conspicuous executive and administrative officers like governors, attorneys-general, and mayors. But where the conditions and character of the work to be performed are less familiar to the general run of voters, other modes of getting rid of the unfit will usually be preferable—even though none of them is without objectionable features.¹

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CHAPTER XIII

NOMINATING AND ELECTING A PRESIDENT

Every two years, the people of the United States elect 435 members of the national House of Representatives, one-third or more of the ninety-six senators, and multiplied thousands of state and local executives, administrators, lawmakers, and judges. Every four years, they choose, in addition, a president and a vice-president—or at all events the 531 “electors” who later, meeting in the various state capitals, go through the formality of registering and confirming the popular verdict. It is in nominating and electing these topmost officials that parties are stirred to liveliest action and voters drawn in largest numbers to the polls; and in considering how our highest official of all reaches the White House, we are not only paving the way for a later study of his powers and functions, but also bringing into sharper focus the popular basis on which our government is supposed to rest.¹

The
pageant
of a
presidential
election

The pageant of a presidential election in the United States is, indeed, the most remarkable thing of its kind anywhere. Hardly is a new chief executive settled in the White House, with four long years of toil and anxiety ahead of him, before plans are afoot for the next supreme test of electoral strength; and as the red-letter date approaches, potential candidates emerge, “booms” are launched, personal and party groups spar for advantage in the press, on the floor of Congress, and in the swirls and eddies of congressional, state, and local politics. Four or five months before the choice is to be made, tumultuous national conventions battle over nominations and platforms. A pause intervenes for taking stock and for throwing the nation-wide party machinery into high gear; then the fight is on. With steady crescendo, the drama advances from scene to scene, until at length, on election day, forty to fifty million people go to the polls and settle the fate of the candidates. Thousands of speeches have been made, floods of ink spilled, millions of dollars spent.

An Electoral System That Did Not Work as Intended

The
system
originally
adopted

Needless to say, this is not at all the sort of thing that the makers of our national constitution had in view. Having decided against election of the president (1) by Congress, on the ground that if so chosen he would not be sufficiently independent, or (2) directly by the people, because of fear of “tumult and disorder” and apprehension lest the voters,

¹ Congressional, senatorial, and other elections will be dealt with at appropriate points below.

scattered thinly over what already seemed a large country, would not be able to inform themselves on the qualifications of candidates, the convention—after taking no fewer than thirty, different votes on the subject—finally accepted Hamilton's plan for indirect popular election through the filtering medium of an "electoral college." The decision seemed a happy one, and the resulting provisions became one of the few features of the new constitution that did not have to be defended during the contest over ratification. Each state was to have as many electors as it had senators and representatives; and after such electors should have been chosen, in such manner in each state as the legislature thereof should direct, they were to meet and each cast a ballot for two persons, at least one of whom should be a resident of a different state. The votes from all of the states having been assembled and counted, the person receiving the largest number, if a majority, was to be declared president. If more than one person received a majority, and had an equal number of votes, the House of Representatives, voting by states, should choose between them. If, on the other hand, there was no majority at all, the House (again voting by states) should choose from among the five highest on the list. (In every case, after the presidency was settled, the person having the next largest number of electoral votes should be vice-president), with the proviso that in the event of a tie, the Senate should, by individual ballot, choose between those having equal numbers.¹ The people, it was assumed, would, directly or through their legislatures, choose the electors from among the most capable and trustworthy men of the respective states;² the electors, in turn, would conscientiously weigh the qualifications of persons available for the presidency, and, having made up their minds, would cast their ballots accordingly.)

(For a short time, the plan worked as its authors intended. In 1789, and again in 1792, every elector wrote the name of Washington on his ballot—but with no approach to agreement on a second name. In 1796, thirteen different persons received votes, evidencing as yet wide freedom of choice on the part of the electors. But in 1800 every elector except one wrote on his ballot the names of either Jefferson and Burr or Adams and Pinckney. The reason was that in the meantime two political parties had arisen, and each had taken steps in advance of the popular election to designate its "candidates" for the presidency and vice-presidency, and also to put before the voters of the several states lists of men who, it was understood, would, if chosen by the people (or legislatures), cast their electoral ballots in all cases for the recognized candidates of the party to which the given electors belonged.) Reduced by this wholly unexpected development to a "row of ciphers"—a mere recording machine—

Effect of
the rise
of po-
litical
parties

¹ Art. II, § 1. It seems to have been expected that the vote would usually be so split up that the election would be thrown into the House—"nineteen times in twenty," thought George Mason.

² For a good while after 1789, the electors were chosen in several states (until 1860 in South Carolina) by the legislature.

The
Twelfth
Amend-
ment
(1804)

the electoral college kept on functioning, in form, as it does to this day. But never in nearly a century and a half has it served the major purpose for which it was created; and many people would like to see it abolished.

The changed position of the electors portended a difficulty which indeed arose immediately. Jefferson and Burr, in 1800, received not only the largest number of votes, but the same number; and the House of Representatives was called upon to break the tie. Such a contingency had been duly provided for. Nevertheless, at its very first appearance it precipitated a grave political crisis, with the Federalists narrowly restrained from deliberately frustrating the will of their opponents by throwing the election to Burr. The upshot was that before another election came around, the constitution was amended so as to provide that the electors should in all cases "name in their ballots the person voted for as president, and in distinct ballots the person voted for as vice-president." Thenceforth, the two offices were voted for and filled separately; and the troubles of 1800 could never again arise in the same form, even though, of course, an election might still be thrown into the House (or, in the case of the vice-president, into the Senate).¹

Machinery for Nominating Candidates—The National Convention

Nomina-
tions
become a
necessity

The next significant development had to do with a matter for which the framers of the constitution made no provision at all, *i.e.*, the nomination of candidates. Under the electoral system intended, there would, of course, have been no occasion or opportunity for nominations. Once parties appeared, however, the situation was otherwise. Aiming at capturing control of the offices, they must be in a position to concentrate their support upon given candidates. This they could do only if such candidates were agreed upon in advance; and forthwith arose the need for machinery for selecting them.

From
congres-
sional
caucus to
national
conven-
tion

The first device hit upon was the one easiest to contrive, *i.e.*, a caucus composed of the (national) senators and representatives of a given party; and it was employed regularly from 1800 to 1824. There were, however, serious objections to it. It acted only by assumed authority;

¹ It remained legally possible for the president and vice-president to be members of different parties; and this is still possible. The firmly established custom requiring every elector to cast ballots for both the presidential and vice-presidential candidates of his party can be depended upon, however, to avert so awkward a contingency. Incidentally, the rise of parties and the adoption of the Twelfth Amendment relegated the vice-presidency to a lower position in popular esteem than had been intended for it. Originally, *all* candidates were to be considered, presumably, with reference to their fitness for the presidency. But after 1804 vice-presidential candidates became a species apart, their qualifications inevitably being judged on different and less exacting lines. In this respect, the new system was a change for the worse.

It may be added that on two or three occasions a few electors have cast their ballots for candidates other than those of their party. In the early stages of the 1944 campaign, it was predicted that an appreciable number of Southern Democratic electors would not vote for President Roosevelt for a fourth term; but the threat did not materialize.

it provided little or no voice for party members in states in which the party was in a minority; and it gave members of the legislative branch an influence in selecting the chief executive which they clearly were not intended to have. In a period of steadily broadening democracy, revolt against it became inevitable; and in 1831 both the National Republican and Anti-Masonic parties turned to a plan of popularly chosen nominating conventions which already had won favor in the domain of state politics. Candidates were nominated and platforms adopted; and in 1832 the Democrats fell into line with a convention of their own. Many political leaders, including Webster and Calhoun, opposed the new device on the ground that it gave too much power in party matters to the rank and file. Nevertheless, by 1840 the national convention had become the generally accepted means of putting both candidates and platforms before the voters; and such it has remained.

To understand the way in which pre-idential and vice-presidential candidates are nominated nowadays, it is necessary, therefore, to know something about the national convention—how it is called, of whom it is composed, how it is organized, how it goes about its work, and what are its merits and defects.

The national conventions of the two major parties, and likewise of such minor parties as have built up a permanent organization, are held on call of the national party committee. In January or February preceding a presidential election, the committee meets (invariably in Washington in the case of the Republicans and Democrats), decides upon the place and date of the coming convention, and authorizes the party organizations in the states and territories to see that delegates and alternates are chosen in accordance with an apportionment set forth in the call. The Republicans commonly hold their convention about the middle of June, the Democrats two or three weeks later; and the place is selected—usually from a list of cities competing for both the advertising and the business that such a meeting brings—with an eye not only to routine matters like railroad connections and hotel and convention-hall facilities, but the preferences of influential candidates and of leading politicians, the need for stirring enthusiasm in a given state or section, and other considerations of party interest or strategy.¹

Except in so far as state laws regulate the method of electing delegates, every party determines for itself how its conventions shall be made up; national law has nothing to do with the matter. In earlier days, the party following in each state was commonly allowed a quota of votes (and of delegates) equal to the state's electoral vote, or, to put it differently, the number of its senators and representatives in Congress. From

Arrange-
ments
for con-
ventions;
time and
place

Conven-
tion
member-
ship

¹ Chicago, centrally located and with excellent hotel and auditorium accommodations, draws more of the conventions than any other city; but St. Louis, Kansas City, Cleveland, Baltimore, and Philadelphia usually stand some chance of being selected.

1852 to 1872, the state delegations in the Democratic convention consisted of double this number, but each delegate had only a half-vote. After 1872, the number was determined in the same way, but each delegate had a whole vote;¹ and this likewise was the Republican plan from 1860 until after the convention of 1912. In both parties, the regular practice long was to allow each state (a) four delegates-at-large, with two others for each congressman-at-large, if any, and (b) two district delegates for every congressman representing a district.

Further
incon-
gruities

It would seem an elementary principle that seats in a representative body should be apportioned according to the numbers and location of the people to be represented. Manifestly, however, the national nominating convention has been constructed on no such plan. Before changes made in the last two or three decades, a Northern state containing few Democrats was entitled to exactly as many delegates in a Democratic convention as a Southern state, of equal total population, containing ten or twelve times as many. Similarly, Southern states yielding few Republican popular votes (and, with rare exceptions, no electoral votes at all) sent to Republican conventions more delegates than Northern states, of less total population, which unfailingly rolled up substantial Republican majorities; slender Southern Republican minorities had great weight in selecting candidates and making platforms, but contributed little or nothing to party victory.²

Repub-
lican
reforms

For many years, protest among Republicans against these illogical arrangements was fruitless. But after the defeat of 1912—following a party split aggravated by the South's gross over-representation in the nominating convention—the matter was belatedly taken up; and eventually, in 1923, the national committee (acting on instructions from the 1920 convention) introduced a scheme under which each state became entitled to (a) one district delegate from each congressional district; (b) an additional delegate from each congressional district casting 10,000 Republican votes for president or congressman in the last preceding election; (c) four delegates-at-large; (d) two additional delegates-at-large for each congressman-at-large that a state might happen to have; and (3) three further delegates-at-large (as a sort of bonus) if the state cast its electoral vote for the Republican presidential nominee in the last presidential election. Under this somewhat complicated plan, many states—chiefly in the South—continued to be over-represented. In the convention of 1944, however, the situation was further improved by a rule (adopted by the 1940 convention) under which only districts which cast

¹ Except that in all of the conventions from 1924 to 1944 inclusive each state was allowed eight delegates-at-large (half being women), each with a half-vote.

² Thus, in the convention of 1912, Georgia, which had cast only 41,692 Republican votes four years previously, had twenty-eight delegates, whereas Iowa, with 275,210 Republican votes in 1908, had only twenty-six; and Alabama, Louisiana, Mississippi, and South Carolina, with a total Republican vote of 42,592, had eighty-two delegates, while "rock-ribbed" Pennsylvania, with a Republican vote of 745,779, had only

at least 1,000 Republican votes in the preceding presidential or mid-term congressional election were entitled to any delegate at all.¹

With only minor modifications in a few instances, the Democrats adhered to the traditional plan until 1940. Under a rule then adopted, every state (beginning in 1944) carried by the Democrats in the preceding presidential election became entitled to a bonus of two extra convention votes—an arrangement designed primarily to compensate the Southern states for their loss of a virtual veto on nominations when, in 1936, a new regulation provided for nomination thereafter by simple majority rather than by the previous two-thirds.²

The Democrats take up the problem

Speaking strictly, the composition of a national convention is defined in terms of votes, rather than of delegates; for although since 1872 the normal arrangement has been for each delegate to have one vote—the Republicans adhering to this usage fairly consistently—there has been nothing to prevent a state from sending a number of delegates exceeding the number of votes to which it was entitled, each delegate in such a case casting only a fractional vote. The motive for doing this has usually been to provide good convention-floor seats for the “boys from home”; and in Democratic conventions the abuse of late reached astounding proportions. To the Chicago convention of 1940, one Mississippi district sent fifty-four delegates to cast its two votes (each delegate shouldering the frightful responsibility of one-twenty-seventh of a vote!), and the state of Texas sent 132 delegates to cast a total of forty-six votes; all told, 1,844 delegates appeared—although to cast only 1,100 votes. On complaint of officials in charge of seating arrangements, the 1940 convention decreed that thenceforth no state might send delegates in excess of twice its quota of votes; and in 1944 the total fell to 1,176. But in any event—recalling that for every delegate there is an alternate holding himself in readiness to take part whenever needed as a substitute—one can see that a national convention is bound to be a decidedly numerous body. Even the Republican convention of 1944 contained 1,055 delegates and the same number of alternates.

Numbers

Originally, delegates to national conventions were chosen in several different ways—by mass-meetings, by caucuses, by district and state conventions, even by state party committees. Gradually it became the practice of the Republicans to elect delegates-at-large in state conventions and district delegates in conventions held in the several congressional districts; and by rules adopted in 1884 and 1888 the national committee made this plan obligatory. Viewing the state as the basic unit of repre-

Methods of choosing delegates

¹ Some seventy-five districts, almost wholly in the deep South, consistently fail to meet this new minimum requirement.

² See p. 232 below; and *Proceedings of the Democratic National Convention, 1940*, pp. 200-202, 341-356.

By courtesy, representation is given also by both parties to the District of Columbia and to various territories and dependences, although these have no part in the final election.

sentation, the Democrats, however, were more likely to authorize selection of all delegates at a state convention or by the state committee.

Rise of
the presi-
dential
primary

Shortly after 1900, the direct primary began to be used in various states in nominating candidates for state and local offices, and inevitably the question arose of applying the new device, by state law, to the choice of delegates to national conventions. This was first done by Wisconsin in 1905, and so rapidly did the idea take hold that in 1916 more than half of the entire number of delegates of both of the leading parties were chosen, in more than a score of states, under the primary plan.¹ Some states, beginning with Oregon in 1910, provided not only for popular election of delegates but for an expression of the voters' preferences among the presidential candidates; some even sought to bind the delegates to be guided by preferences so expressed. From time to time, too, the suggestion was broached that the presidential primary, in some one of the numerous forms that it had assumed, be made nation-wide by federal law. In his first annual message (1913), President Wilson, indeed, went so far as to propose that Congress enact legislation under which candidates for the presidency and vice-presidency should be nominated by direct nation-wide action of the people, and that the national convention be transformed into a gathering merely of party officers and nominee for the purpose of declaring and accepting the verdict of the primaries and formulating the platform. Even had Congress been favorably disposed, however, it would probably not have been regarded as having the necessary power; eight years later, indeed, the Supreme Court became responsible for a ruling construed to mean that Congress had no authority to control nominating procedures at all.²

A device
that
proved
disap-
pointing

As it was, after starting off with apparently irresistible force, the presidential primary movement lost momentum. Since 1916, no additional states have adopted the device in mandatory form; more than that, eight have abandoned it.³ Direct primaries, in general, have not worked out as well as was hoped, and when employed in selecting delegates to national nominating conventions, they have disclosed many serious shortcomings. One fault has been the very great cost to a presidential candidate seeking to carry on a primary campaign throughout the country; a second, the fact that primaries are held at different dates in the various states, which results in one state often having undue influence upon the

¹ The Republican convention of 1912 refused to seat certain delegations chosen under direct primary laws, on the ground that long-established party rules required choice by conventions. But of course this attitude could not be maintained in the face of the undeniable right of the states to regulate matters of the kind.

² But see p. 262, note 2, below.

³ Iowa and Minnesota in 1917, Vermont in 1921, Montana in 1924, North Carolina in 1927, Indiana in 1929, Michigan in 1931, and North Dakota in 1935. In addition, a law on the subject was declared unconstitutional in Texas in 1916, and an Alabama law was abandoned when the attorney-general of the state rendered an opinion pronouncing it also unconstitutional. Alabama, Michigan, Florida, and Georgia, however, now have laws under which primaries may be employed when so ordered by the state committee of a party.

voting in other states; a third, that some of the strongest candidates usually decide not to enter the primaries in certain states, leaving the voters in such states opportunity to choose only among the weaker ones. In short, with primaries held in less than half of the states and, where held, showing many defects, the plan has furnished no genuine solution for the difficult and important problem of making the national convention a body truly representative of the party.

Nor does the future of the device look promising. Those who believe in it (and many people do so) very properly argue that it has never been given a fair nation-wide test. But the only way in which it could be given such a test would be by virtue of an act of Congress; and notwithstanding that the way seems to have been cleared constitutionally for such legislation,¹ neither Congress nor people is sufficiently convinced of the intrinsic merits of the plan. Nor are the taxpayers prepared to shoulder the expense that would be entailed in disentangling the presidential primary from the primaries for state and local offices and operating it as a separate piece of political machinery. Still further, while such a defect as the scattering of primaries over three or four months might be remedied rather easily, others—such as the cost of candidacy—could not. As for the recording of popular preferences among the candidates, that also has its limitations—especially if the attempt is made to pledge delegates to vote for the popular choice. Candidates may withdraw before the balloting; new ones may enter the race; in any event, the ultimate selection will usually be a matter of give and take on such lines that a delegation will be greatly handicapped and embarrassed unless it has a free hand. Meanwhile, with the presidential primary surviving in mandatory form in only fourteen states (though the list includes several of the most populous ones, *e.g.*, New York, Pennsylvania, and Illinois), the delegates of thirty-four states continue normally to be chosen in state and district conventions or by state central committees. Except in 1912, it has not seemed to make much difference in the final outcome whether delegates were chosen by primary or by convention; and even on that occasion the drift of Republican opinion in favor of Theodore Roosevelt, as revealed in the primaries, did not enable him to win in the Chicago convention.²

A doubtful future

¹ See p. 170 above.

² A similar Democratic drift toward Champ Clark did not prevent the nomination from going to Woodrow Wilson. In 1916, Hughes was nominated by the Republicans although he had been a primary candidate in only one state; also, in 1920, Harding, beaten in every primary where one had occurred except in his own state. Results of primaries in 1928 foreshadowed the nomination of Hoover and Smith, who, however, would almost certainly have been nominated had there been no primaries. The primaries of 1932 to 1944 inclusive had, on the whole, little significance except perhaps, for the fact that in 1944 an adverse result in an early Wisconsin primary nipped in the bud a candidacy for the Republican nomination which had been expected to acquire formidable proportions, *i.e.*, that of Wendell L. Willkie. For an excellent treatment of the entire subject, see L. Overacker, *The Presidential Primary* (New York, 1926); and cf. her "Direct Primary Legislation, 1936-1939," *Amer. Polit. Sci. Rev.*, XXXIV, 499-506 (June, 1940).

The National Convention at Work

Condi-
tions
under
which a
conven-
tion
works

Composed mainly of state and local party leaders and workers, business men, lawyers, and journalists, with a liberal admixture of governors of states, senators and ex-senators, congressmen and ex-congressmen,¹ and state bosses, the convention of a major party meets in a large hall, lavishly decorated with flags, bunting, and portraits, and capable of seating usually from fifteen to twenty thousand people. The thousand or more delegates are accommodated on the main floor, grouped around placards bearing the names of their states; the equally numerous alternates are seated directly back of them; representatives of the press, together with radio reporters and commentators, are given generous space (about 1,300 seats in the conventions of 1944); the galleries are packed with intermittently interested and restless spectators; radio "hook-ups" are in readiness to carry the proceedings to every corner of the land.² Except during principal speeches and at occasional tense moments, there is a general buzz of conversation; bands fill in intervals with popular airs; deafening "demonstrations" break forth from frenzied supporters of "favorite sons" or other candidates; sheer chaos sometimes prevails for an hour at a stretch. Small wonder that, many years ago, the late Lord Bryce was moved to remark that the setting seems hardly compatible with the deliberative work to be performed;³ and indeed it is only because practically all of the problems are thrashed out and decisions made behind the scenes—in committee rooms, in the smoke-filled suites of influential delegates, indeed wherever private conferences can be held and understandings reached—that the body performs its functions effectively at all.

Tempo-
rary
organiza-
tion

Although under wartime conditions, the conventions of 1944 were streamlined to cover only three days, such gatherings usually last four or five days—sometimes longer. On the first day (following the normal procedure), the meeting is called to order by the chairman of the national committee, who, after prayer has been offered and the call for the convention read, announces the list of temporary officers agreed on in advance by the national committee; whereupon—the list having been accepted by the convention, usually as a matter of routine—the temporary chairman delivers a "key-note" speech (prepared before the convention)

¹ Formerly, the delegates always included a large number of postmasters, revenue-collectors, and other federal office-holders. The Hatch Act of 1939 (see p. 439 below), prohibiting political activity on the part of such office-holders (except those having to do with framing policy), now operates to debar them from serving. The constitution (Art. II, § 1, cl. 2) forbids members of Congress to act as presidential electors; but, contrary to the spirit of the provision, they take part freely in selecting presidential candidates—which has come to be a far more important matter than serving as an elector.

² The radio first played an important part in the conventions of 1924. The Republican convention of 1940 was signalized by the first use of television on such an occasion, although the service was available only in a restricted area.

³ *The American Commonwealth* (4th ed., 1910), II, 193-194. Cf. E. P. Herring, *The Politics of Democracy* (New York, 1940), Chap. xvi.

eulogizing the party, drawing applause by referring to the great names associated with its past, assailing the record and ridiculing the promises of its opponents, urging harmony, and in general sounding a call to battle. Pending permanent organization, the rules of the convention held four years previously are adopted; and the day's work may close with a roll-call of the states and territories, each delegation nominating, through its chairman, one of its members to serve on each of the four great committees: ¹ (1) credentials; (2) permanent organization; (3) rules and order of business; (4) platform and resolutions—although the less wearisome plan is generally followed of permitting the chairmen of the several delegations merely to hand in written lists of proposed committee assignments.

The next sessions, extending over at least one day, are devoted to receiving and acting on the reports of these committees. The committee on rules and order of business submits a set of rules based on those of the House of Representatives and more or less similar to those of the previous convention, together with an order of business which adheres closely to past practice; and its report is usually accepted with little or no discussion. The committee on credentials has the difficult task of allotting contested seats, supposedly on the basis of evidence filed in advance with the national committee. Sometimes, as in the Republican convention of 1912, contests are numerous; and according as they are decided, the scale may be turned for or against control by a given element of the party, or for or against the nomination of a given candidate. Hence, although the list made up and reported by the committee is usually accepted, heated controversy may arise and the committee may be overruled.² Committee reports

The next step, normally—although sometimes it is taken before the list of approved delegates is fully made up—is to effect permanent organization. The committee on that subject reports, nominating a list of permanent officials; and ordinarily the persons named are elected without debate, although it was only after a sharp contest on the floor that Senator Walsh was chosen permanent chairman of the Democratic convention of 1932. The permanent chairman will have many difficult decisions to make, and he must be both a master of parliamentary law and a man of energy and decision. Not infrequently, he is a United States senator. Permanent organization

Following a lengthy, and usually more restrained, speech by the new presiding officer, the convention is ready for a report from the com-

¹ Both major parties now give women equal representation with men on the platform and resolutions committee, so that in this case each state delegation proposes two names.

² In the interest of harmony, two contesting delegations from a state are sometimes admitted, each member being allowed a half-vote. This, for example, was the plan followed by the Democratic convention of 1944 in dealing with contesting delegations from Texas—although the "regular" delegation walked out of the convention in protest.

Forming
and
adopting
the
platform

mittee on platform and resolutions.¹ Starting commonly at least two or three days before the convention meets, and working day and night over a vast array of platform proposals—bombarded also with suggestions and demands from both delegates and outsiders²—the committee will usually have succeeded in whipping together a document which it can report unanimously;³ and while there is commonly some show of discussion on the floor, and occasionally a lively contest, only rarely is anything finally voted that the committee has not proposed. As approved by the convention, the platform is likely to be a document filling ten or a dozen pages of print and touching upon a wide variety of topics.⁴ On some matters it will make clear and definite pronouncements; on others—usually *most* others—it will be wordy and evasive; on still others, although perhaps of major interest and importance, it will be completely silent, for the reason that anything that could be said would tend to alienate votes. But there will be plenty of generalities, smugly reviewing the party's achievements, indiscriminately indicting the opposition, and in other ways appealing to party pride and loyalty. By and large, the platform is viewed by the sophisticated, not as a program to be carried out to the letter if the party wins, but rather as a bid—required by custom, and couched in the familiar catch-phrases—for the confidence and support of the less sophisticated elements in the electorate.⁵ Fully understanding this, people are rarely so naïve as to take a platform seriously—or even to read it. Sometimes, indeed—as in 1928 and 1932—platforms are so overshadowed by the personalities and announced policies of the candidates that, once the campaign is under way, they almost fade out of the picture.⁶

¹ Prior to 1932, the Democrats customarily nominated candidates before adopting a platform. In 1932-44, however, they adopted their platform first (as the Republicans have regularly done); and it seems safe to assume that this will be their practice in the future.

² Especially from organized economic, business, professional, and reform groups such as the A. F. of L. and the C.I.O., the American Farm Bureau Federation, the American Legion, and the Chamber of Commerce of the United States. "Lobbying" by special interests, as we shall see, is by no means confined to the halls of Congress and of state legislatures. A president having his party's support for reelection naturally has a great deal to say about the platform on which he will run. Before being submitted to the Philadelphia convention, the Democratic platform of 1936 was approved in every particular by President Roosevelt, and a later version of it was rushed to him by airplane and further amended by him before being adopted. There was also nothing in the 1940 and 1944 platforms to which he had not given his advance approval.

³ Although formally elected only after the convention opens, the platform committee, or at any rate a sub-committee of it, will have been constituted informally in advance, in order that it may thus begin work early.

⁴ The brief, crisp platform (1,600 words) adopted by the Democrats at Chicago in 1932 is a notable exception. The Democratic platform-makers of 1944 started off with the idea of a document even briefer, but in the end succumbed to pressures from groups demanding that this or that be included.

⁵ Woodrow Wilson himself, after being nominated for a second presidential term by a party which four years previously had declared for only one term, bluntly asserted: "A platform is not a program."

⁶ In 1944, the Institute of Public Opinion found that, three weeks after the Republican convention, not one voter in ten had any idea of what was in the party's platform on world affairs and not one farmer in twelve knew anything about the

At last, by the third or fourth day, the convention arrives at its main objective, i.e., the nomination of candidates. The secretary calls the roll of states, beginning with Alabama, and each delegation, in its turn, has an opportunity to place a favorite son or other person in nomination. If the delegates of a state which stands near the top of the list choose to do so, they may yield to a delegation which under alphabetical order would not be called until later; and this opportunity to get a candidate's name officially before the convention in advance of others, and to touch off a demonstration in his behalf, may prove a decided advantage. Anywhere from two or three to upwards of a dozen names may be presented, each in a vigorous, eulogistic, and sometimes flamboyant nominating speech followed by briefer seconding speeches by delegates carefully picked to give an impression of widely distributed support;¹ and no effort is spared by either the orators or the delegates and spectators favoring a given candidate to whip up enthusiasm for him. At the proper psychological moment, delegates and alternates may break forth with all manner of vocal and mechanical noise, seize flags and standards and start parading around the hall, and plunge the assemblage into pandemonium from which it is extricated only when the enthusiasts have reached a state of exhaustion an hour or more later. Occasionally such demonstrations are genuinely spontaneous; but usually they are staged according to careful prearrangement, and, being known to be so, are viewed by on-lookers with mild amusement or growing impatience and quite fail in their purpose of sweeping the convention off its feet.²

Nomina-
tion of
candi-
dates

When, finally, all of the names have been presented, the convention proceeds to vote. The roll of states is called again, and the delegations, through their chairmen, announce their votes. Under early Republican procedure, each delegate might usually vote as he liked; in any case, he had a right to have his vote recorded separately. The Democrats followed the different plan of permitting the state convention to require the delegates to the national convention to cast their votes in a block for one candidate; and even if no such requirement was imposed, the delegation itself might, by majority vote, determine how the votes of all of its

Voting
on the
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planks on agriculture. A month after the convention, the Republican candidates, Dewey and Bricker, met with a score of other Republican governors in a two-day conference at St. Louis and with them drew up a fourteen-point statement of policy considerably more explicit than the platform and expected to receive almost as much attention in the coming campaign. In point of fact, in the campaign both principal candidates devoted their attention so largely to attacking the Roosevelt Administration and its record that neither the party platform nor the St. Louis declaration received a great deal of emphasis.

¹ There have been instances in which convention oratory rose to the level of genuine eloquence. Robert G. Ingersoll's "plumed knight" apostrophe, placing Blaine in nomination at Cincinnati in 1876, is a case in point; also the "cross of gold" speech which won William Jennings Bryan an unexpected nomination at Chicago in 1896. Emotionalism and bombast are, however, far more frequent. The Democratic convention of 1940 restricted nominating speeches to twenty minutes and seconding speeches (not to exceed four) to five minutes.

² Sometimes the spectators become demonstrative also, as notably in behalf of Wendell L. Willkie during the Republican convention of 1940.

members should be recorded. This historic "unit rule" conformed to the states' rights antecedents of the Democratic party, and had the practical advantage of augmenting the power and importance of a state in the convention's proceedings. The rise of the presidential primary made it necessary for the Republicans to look more tolerantly on instructed delegations, and, on the other hand, forced the Democrats to permit numerous exceptions to their unit rule. In so far as feasible, both parties still hold to their earlier practices; but in point of fact the majority of delegates are free to vote as individuals.)

The Democratic "two-thirds" rule abandoned

(Until rather recently, another important difference between Republican and Democratic procedure was that whereas a simple majority of all votes cast was sufficient to nominate in a Republican convention, the Democrats required two-thirds. The Democratic rule dated from 1832, being at first applied to the vice-presidency only; in 1836, however, it was extended to presidential nominations as well.) Although of certain theoretical merit, it, as well as the unit rule (with which it was closely connected) came in for vigorous criticism in later days, and party opinion increasingly demanded the abrogation of both.¹ As already pointed out, the unit rule partially collapsed under the impact of the direct primary, instructed-delegation plan of choosing delegates; and a movement for doing away with the twin regulations failed at the Chicago convention of 1932 only because of reluctance to change the rules while the game was being played, *i.e.*, while a contest for nomination was actually going on. The Philadelphia convention of 1936, however, found itself in a position to act; President Roosevelt was about to be renominated without opposition, and hence the chances of no candidate would be in any way affected. The convention, therefore, rescinded the historic two-thirds requirement and prescribed that thenceforth nomination—for both the presidency and vice-presidency, of course—should be by simple majority. No action was taken on the unit rule; but eventually its complete abandonment is likely to prove necessary as a means of preventing nominations from being too much controlled by a few of the most populous states.²

The balloting

(After the votes of all of the states have been recorded and counted, the result is announced. Sometimes—especially when a president is being renominated—a single ballot suffices.³ But often the votes are so divided

¹ The two-thirds rule was responsible for numerous convention deadlocks, and more than once—as in 1924—it prevented the party's strongest candidate from receiving the nomination.

² Abrogation of the two-thirds rule deprived the South of the control over nominations previously enjoyed by that section, and—as was evidenced in the 1944 convention—there is demand in that section for a restoration of the former system.

³ No printed or written ballots are employed; all voting is oral. The term "ballot" is, however, commonly used to designate a vote. Occasionally a candidate has been nominated by acclamation, without a roll-call even being completed. The forces in the Democratic convention of 1940 supporting Franklin D. Roosevelt for a third term hoped to accomplish his nomination in this way, but were frustrated by third-term opponents.

among a number of candidates that no one obtains the requisite majority, and additional ballots must be taken. In the course of these, weaker candidates drop out; and eventually some one of the contestants—or, perchance, a “dark horse”—emerges a victor. Sometimes the contest is very prolonged, the extremest case on record being the nomination of John W. Davis by the Democrats in 1924 on the 103rd ballot, after a deadlock lasting nine days. Abandonment of the Democratic two-thirds rule will, however, tend to prevent such occurrences in the future.

The nomination for the presidency having been made, the weary delegates hurry their labors to a conclusion. A candidate for the vice-presidency is still to be named; and the same procedure—roll-call, nominating and seconding speeches, and balloting—is followed. But the contest is usually not very keen, and a decisive vote is soon reached. As a rule, the grounds on which the selection is made leave a good deal to be desired. The prize—such as it is—may be used to placate an important element in the party that has lost in the fight over the presidential nomination or over the platform, or to enhance the chances of capturing a pivotal state. It will usually be bestowed also with a view to balancing the ticket: an Eastern presidential nominee calls for a Western vice-presidential nominee; a dyed-in-the-wool conservative must ordinarily be counterbalanced with a man of known liberal views, or *vice versa*.² Every sort of consideration, indeed, may contribute to the decision except the one that ought to dominate, *i.e.*, that the person nominated stands a very fair chance of being summoned by fate to the White House. Despite the melancholy fact that this has happened seven times in our history, and that on some occasions it resulted in a weak or unsuccessful administration, the vice-presidency is still, as some one has remarked, “lightly esteemed and carelessly bestowed.”³

The nomination for the vice-presidency

Two final tasks remain (or used to do so), one important, the other not at all so, and neither very arduous. The convention, or party congress, meets only once in four years, and there must be an accepted party authority to carry on during the interval and in due time to convoke and arrange for the next convention. This authority is the national committee, consisting, as we have seen, of two members—a man and a woman

The convention closing acts

¹ The nomination of Henry A. Wallace for the vice-presidency in the Democratic convention of 1940 stirred unusual excitement because many of the party leaders were opposed to him and resented President Roosevelt's virtual dictation that the Secretary of Agriculture be made his running mate. Equal excitement was stirred in the convention of four years later, when, with Mr. Wallace vigorously supported by liberal and radical elements for a renomination, the President gave him only a gesture of assistance and in the end threw his support to a successful rival, Senator Harry S. Truman. In contrast with what usually happens, the 1944 convention devoted almost a full day—and its most strenuous one—to the vice-presidential nomination.

² This sort of thing did not happen in the Democratic convention of 1940, but only because President Roosevelt insisted upon, and contrived to bring about, the nomination of a man holding views similar to his own. There was probably not much difference in liberalism, too, between the Republican nominees of 1944.

³ The nadir was reached in 1904 when the Democrats nominated a wealthy but undistinguished senator eighty-one years old! In all, nine out of thirty-four vice-presidents have gone on to the presidency.

—from each state and territory. Since, however, these persons are in all cases designated (in theory, "nominated") either by the state delegation or through some kind of state primary, election of the committee by the convention is only a matter of form. The other task which at least formerly remained was to designate (usually by authorizing the convention chairman to appoint) two committees, each consisting of one representative from each state, to carry the news of their nomination to the respective candidates. Although giving the nominees opportunity to deliver more or less significant speeches of acceptance, the old-style "notification" ceremonies were expensive and rather perfunctory; and these days of quick and easy travel by air and communication by radio will probably see them permanently abandoned. (Franklin D. Roosevelt got his campaign off to a dramatic start in 1932 by climbing into an airplane at Albany and a few hours later descending from the skies at Chicago to accept his nomination forthwith; in 1936, also, he appeared at Philadelphia and accepted his nomination as the closing feature of the convention; and in 1940 and 1944, without actually going to the Chicago conventions, he accepted his third and fourth nominations by radio broadcast—in the second instance, from a railway car on a siding near a naval station on the West Coast.) Until 1944, the Republicans clung to the traditional notification ceremonies. In that year, however, Thomas E. Dewey, duplicating Mr. Roosevelt's feat in 1932, journeyed from Albany to Chicago by air and accepted his nomination (as his running mate had already done) from the convention rostrum.

The Presidential Campaign

Machin-
ery

At an early date, the new national committee meets and organizes for work during the coming campaign and the ensuing four years. A chairman is chosen, nominally by the committee, but always in accordance with the wishes of the presidential candidate; and while the latter sometimes—as in the case of both of the Roosevelts—largely determines the strategy to be employed, the chairman is officially, and as a rule actually, the campaign manager. Under his direction, sub-committees and auxiliary committees are set up; a treasurer is appointed and the quest for funds begun; headquarters are opened, usually in both an Eastern and a Western city, with subsidiary offices in a few other centers; a "campaign textbook" (containing the platform, notification and acceptance speeches, biographies of the candidates, statistics and quotations tending to substantiate party arguments, and many miscellaneous materials) is published and given wide distribution; a speakers' bureau is organized; and an appeal for votes is launched which, once the campaign has got actively under way (usually by early September), is kept up with increasing resourcefulness and fervor to the day of reckoning. Campaigns for the election of senators and congressmen, state officials and members of state legislatures, and municipal and other local authori-

ties are, of course, going on simultaneously, stirring all party machinery, from national committees to precinct committees, to new vigor and activity.

No aspect of American political life is more familiar, even to younger people, than presidential campaigns; few have been written about more profusely by journalists, politicians and scientific students of political behavior. Comment here may therefore appropriately be brief. To begin with, it costs a great deal of money to run a presidential campaign; and while ideally the sums needed should be obtained from the great body of party adherents and supporters in the form of modest contributions from many contributors, efforts to operate on such a basis have never been very successful. As a consequence, the parties must invariably rely mainly upon substantial gifts by people of substance, even though this opens a way for charges of undue influence of such people and the interests they represent, both upon the conduct of campaigns and upon the policies pursued by successful candidates once they are in office.¹ A good deal of the money spent (although relatively less now than before radio broadcasting was introduced) goes for the preparation and distribution of party "literature." In addition to the campaign textbook, each party showers pamphlets, leaflets, posters, cartoons, and what not upon the press, upon local party workers, and upon the general public. Some of the materials are meaty, terse, interesting, and worth while, but many are only reprints of unreadable speeches and compilations of undigested statistics, pretty much a dead loss—except for collectors of waste-paper! It is a fair assumption that the great majority of voters read little or nothing relating to a campaign and its issues except what they find in their favorite newspaper.²

Then there is campaign oratory. The "stump" is the vantage point from which office-seekers and party workers have bombarded the voters as long as there have been elections, and the later stages of a presidential campaign find literally thousands of men and women going up and down the land haranguing audiences in great halls, in stadiums, in court-house yards, in school-houses, and in fact wherever crowds can be assembled, with sometimes parades and other demonstrations designed to rally the faithful and impress the hesitant. Ordinarily, a president seeking reelection stays fairly close to the White House and makes only a few speeches, Wilson in 1916, Hoover in 1932, and Franklin D. Roosevelt in 1936 being the principal exceptions; as president, he can keep the public eye and make the front page simply by his official acts and reported press conferences. A challenger, on the other hand—a Roosevelt in 1932, a Landon in 1936, a Willkie in 1940, a Dewey in 1944—is likely to go on speaking tours taking him into all, or nearly all, prin-

¹ See pp. 192-197 above.

² H. A. Bone, *Smear Politics; An Analysis of 1940 Campaign Literature* (Washington, D. C., 1941); T. M. Black, *Democratic Party Publicity in 1940* (New York, 1941).

Funds

Literature

Oratory

cial sections of the country, particularly if, as in the cases of Landon and Willkie, he had not previously been widely known. It is, however, a matter of opinion whether any candidate gains more than he loses by dashing around the country. Such traveller-candidates as Bryan and Willkie failed to reach the White House; Charles E. Hughes would almost certainly have beaten Woodrow Wilson in 1916 if he had stayed away from California.¹

Radio
broad-
casting

Also there is the radio. In part, the disparaging remarks made above about campaign literature were inspired by the fact that in these later days voters depend more upon the ear than upon the eye—more upon what they hear than upon what they read. In the United States as in no other country, radio broadcasting has revolutionized electoral techniques. Formerly, candidates and other campaign orators could reach by voice only those people who would take the trouble to attend their meetings; nowadays, they project themselves into the voters' homes, competing, to be sure, with sport and entertainment features, but certainly getting a hearing far beyond the limits of their visible audiences. Broadcasting time is limited and expensive; and this makes for more carefully prepared speeches. The same speech, furthermore, cannot be used twice. At all events, the ablest speakers that the parties can enlist may be heard and their arguments compared in twenty-five million homes the country over.² Small wonder that in 1940 more than fifteen per cent of the total outlay of the Republican national committee, and over seventeen per cent of that of the Democratic committee, went to broadcasting companies in payment for access to the air, and in 1944 proportions even larger.³

Polls
and
surveys

Still another newer campaign feature is advance polling of the voters, by the sampling method, carried on most extensively some years ago by a now extinct weekly publication, the *Literary Digest*, and employed with rather remarkable success in the most recent campaigns by the American Institute of Public Opinion (conducting the well-known "Gallup poll"), the magazine *Fortune*, and other private agencies. The ebb and flow of popularity of the candidates is measured and reported upon through the press, usually weekly; and, although always in some danger of being misled, candidates and party managers alike derive information which may lead to important decisions concerning issues to be emphasized or

¹ On campaign debate and oratory, see E. P. Herring, *The Politics of Democracy*, Chap. xviii.

² In 1940, the Republican candidate, Wendell L. Willkie, introduced the new technique (not utilized since) of employing radio time for reading and answering, in conversational style, questions addressed to him from over the country—in short, a sort of long-distance round-table.

³ Useful discussions of presidential campaigns will be found in A. N. Holcombe, "Mechanics and Maneuvers of Campaigns" (a radio address in Oct., 1932, obtainable from the University of Chicago Press); R. C. Brooks, *Political Parties and Electoral Problems* (3rd ed.), Chap. xii; P. H. Odegard and E. A. Helms, *American Politics*, Chaps. xvi-xix; V. O. Key, Jr., *Politics, Parties, and Pressure Groups*, Chap. xviii; and R. V. Peel and T. C. Donnelly, *The 1928 Campaign; An Analysis* (New York, 1931), and *The 1932 Campaign; An Analysis* (New York, 1935).

soft-pedaled and areas in which effort is useless or, on the other hand, should be redoubled. The published results, and the forecasts based on them, may also considerably influence campaign contributions. In addition to polls, there are "surveys," leading also to eagerly awaited forecasts grounded upon poll results, press estimates, studies of historical trends, and other factors, and most commonly conducted by newspapers like the *New York Times*, the *Washington Star*, and the *Chicago Tribune*.¹

Casting and Counting the Electoral Vote

What happens after the last local "spellbinder" has descended from the rostrum, the last national "hook-up" has brought the leading candidates' appeals to the voter at his fireside, and the last rosy forecast has been given out by an at least outwardly confident party chairman? Early in the campaign, party conventions or committees, in each state, have made up the respective "slates" of presidential electors, and in due course ballots were prepared on which (in all except seventeen states) the lists of electors were printed in parallel columns, under the familiar party symbols.² When the people finally go to the polls, they think of themselves as voting for president and vice-president; and, barring certain contingencies, they do actually determine who shall fill these two high offices. In form, however, they vote only for the electors, even though they usually do not know or care who they personally are; and in a few states the names of the presidential and vice-presidential candidates do not appear on the ballots

Presi-
dential
electors

(To many persons it would come as a surprise to be told that the presidential electors were not always chosen exclusively, or even mainly, by popular vote. A national law dating from 1845 requires that they be elected in all cases on the Tuesday following the first Monday in November; but as for the mode of selection, there has never been any nation-wide rule except a simple constitutional provision that each state

Choice
by legis-
latures
gives
way to
choice
by the
people

¹ In 1940, *Fortune's* poll indicating 55.2 per cent of the popular vote for Roosevelt proved erroneous by only one-half of one per cent. The Gallup poll underestimated his vote by 2.7 per cent. Even before the nominating conventions were held, Mr. Louis H. Bean, economic adviser to the Secretary of Agriculture, predicted, on the basis of study of the available statistical and other data, that the Democratic candidate would receive between 54 and 55 per cent of the popular vote—the actual figure turning out to be 54.7. In 1944, the Gallup poll again proved reasonably accurate, although some other forecasters did not fare so well. On the general subject, see L. H. Bean, *Ballot Behavior; A Study of Presidential Elections* (Washington, 1940), espec. Chap. x, and V. O. Key, Jr., *Politics, Parties, and Pressure Groups*, Chap. xx. Criticisms of polls as having little trustworthiness or utility are directed mainly to tests of opinion on particular issues or questions rather than to tests of electoral alignments. Cf. L. Rogers, "Do the Gallup Poles Measure Opinion?," *Harper's Mag.*, CLXXXIII, 623-632 (Nov., 1941).

It goes without saying that there are many forms of campaign activity in addition to those here mentioned. One effectively stressed in the 1944 contest was getting voters registered.

² The number of electors on the party lists in a given state corresponds, of course, to the number of electoral votes to which the state is entitled. The electors themselves are usually party leaders or other prominent party members, but, as noted above, may in no case include members of Congress or holders of office under the national government.

shall determine the matter for itself by action of its legislature. At the outset, the legislature itself elected in a majority of states, and the people took no direct part at all. As democratic sentiment grew, however, popular election was substituted in one state after another, with the result that after 1832 the legislature elected only in South Carolina, and there only until the Civil War.)

district
and
general
ticket
systems

In states in which the electors were from the first chosen by the people, it was at one time not unusual to employ a district system, under which one elector was chosen by the voters of each congressional district and two were elected by those of the state at large. The competition of political parties, however, caused this plan to lose favor. Under the district system, the electoral vote of a state was likely to be divided among two or more candidates; to win the full vote, it was necessary for a party to carry every district. The alternative was, of course, a general ticket system, under which a party could make a clean sweep merely by securing a plurality throughout the state as a whole. Enhancing, as it did, the general importance of a state in national politics, this plan won the support both of party leaders and of public sentiment. In 1832, only four states retained the district system; and they soon gave it up. Michigan reverted to it in 1891, but only temporarily.¹ In every state, therefore, each voter votes for as many electors as his state is entitled to, *e.g.*, forty-seven in New York, twenty-eight in Illinois.

"Minor-
ity"
presi-
dents

(A majority in the electoral college is necessary to victory—unless achieved through election by the House. But this does not prevent us from having "minority" presidents, *i.e.*, presidents who (speaking strictly, the electors who chose them) received fewer than half of the total popular vote cast. Lincoln, in 1860, obtained more popular votes than did any one of his competitors, but nevertheless polled half a million less than half of the whole number recorded. Wilson, in 1912, received two million more popular votes than did his nearest competitor, Theodore Roosevelt, yet only forty-two per cent of the total. In both of these cases, the opposition was unusually divided. But the same thing can happen even if there are only two major tickets in the field.) Hayes was elected over Tilden in 1876, although his popular vote was about three hundred thousand smaller; and Harrison triumphed over Cleveland in 1888, although with one hundred thousand fewer votes. All that a candidate needs in order to obtain the full electoral vote of a state is a plurality of the popular vote in that state. Popular pluralities, no matter how small, in a sufficient number of states—and no very great number, if the list includes populous states like New York, Pennsylvania, and Illinois—insure

¹ A Democratic legislature of a state which was normally Republican sought in this way to insure that in the approaching presidential election the Democrats would secure a share of the electoral votes. The plan succeeded; nine Republican and five Democratic electors were chosen. But when the Republicans regained control of the legislature, they lost no time in restoring the earlier law. The act of 1891 was upheld by the Supreme Court in *McPherson v. Blacker*, 146 U. S. 1 (1892).

election. The opposing candidate, although failing to carry enough states to give him the requisite number of electoral votes, may have swept those he did carry by sufficiently heavy majorities to give him the cold comfort of priority in terms of popular votes. Wilson's six million popular votes in 1912 were so distributed as to win 435 electoral votes; Roosevelt's four million were so distributed (involving pluralities in only six states) as to win only 88; Taft's three and one-half million curiously contained only two pluralities, *i.e.*, in Vermont and Utah, and yielded only eight electoral votes.¹

The fact that the entire electoral vote of a state falls to the candidates who poll a mere plurality of the popular vote leads the parties to concentrate their campaign efforts upon doubtful states, especially those which have a large electoral vote. New York is such a state; and the party managers are never likely to forget that in 1884 fewer than six hundred popular votes swung that state's thirty-six electoral votes to Grover Cleveland, and that it was these votes that made him a victor over the Republican candidate. This intensification of party activity in pivotal states is disadvantageous in that it presents a special temptation to party workers to resort to vote-buying and other corrupt or dubious practices.

The theory of the constitution is that the electors are officers of their respective states, and it was on this account that the states were left free to determine how they should be chosen. The place where each group meets within its state is fixed by the legislature thereof (being, naturally, the state capital); and if the electors receive any remuneration for their services, it must come out of the state treasury. A federal statute of 1934, however, requires that they meet in the respective states and cast their ballots on the first Monday after the second Wednesday in December following their election. And the Twelfth Amendment to the constitution enjoins that the voting be by ballot; that presidential and vice-presidential candidates be voted for separately; that distinct lists be

Casting
the elec-
toral vote

¹ The arithmetic of our presidential elections presents no end of curious features. In 1928, 1,067,586 Democratic votes in Pennsylvania and 2,089,863 in New York failed to yield a single presidential elector. On the other hand, it would have required a shift of only 416,055 votes in certain close states, out of a total presidential vote of over thirty-six million, to make Mr. Smith president instead of Mr. Hoover. In 1936, 27,752,309 popular votes (sixty per cent of the total) yielded President Roosevelt 523 electoral votes (ninety-eight per cent of the total); 16,682,524 popular votes yielded Governor Landon only eight electoral votes. Each Roosevelt electoral vote represented the preferences of 53,000 voters; each Landon electoral vote, those of 2,085,000. In 1940, 27,243,466 popular votes yielded President Roosevelt 449 electoral votes, and 22,304,755 yielded Mr. Willkie only 82. In 1944, 25,602,505 popular votes yielded Roosevelt 432 electoral votes, and 22,006,278 yielded Mr. Dewey only 99. For an interesting exposition of how the 1928 election would have worked out under a proposed constitutional amendment leaving each state its existing allotment of electoral votes but distributing them, in each state, among the candidates in proportion to their popular votes, see *Proportional Representation Rev.*, 3rd ser., No. 94 (Apr., 1930). Under such a plan, Roosevelt in 1936 would have received approximately 322 electoral votes and Landon 194. Complete data (with helpful maps) on eleven presidential elections ending with that of 1936 are presented in E. E. Robinson, *The Presidential Vote, 1896-1932* (Stanford University, 1934), and *The Presidential Vote, 1936* (Stanford University, 1940).

made up showing all persons supported for either office, with the number of votes received by each; and that these lists, signed and sealed in duplicate, be transmitted to the president of the Senate at the seat of the national government.¹ As evidence of their power to act, the electors transmit also their certificates of election, bearing the signature of the governor.

Counting
the elec-
toral vote

The constitution is explicit enough on most matters, but curiously vague on the counting of the electoral vote. The Twelfth Amendment says that "the president of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted." But who shall make the count? The constitution is silent. If conflicting returns are sent in from a state, who shall decide which shall be received and which rejected? Again, the constitution does not say. For nearly a hundred years, no serious difficulty arose because of this. In the Hayes-Tilden contest of 1876, however, two sets of returns were sent to Washington from each of four different states; and only after an extra-constitutional electoral commission, consisting of five senators, five representatives, and five justices of the Supreme Court, had passed upon the evidence was Hayes declared elected (185 to 184), without a vote to spare. The country was kept in suspense until within two days of the time for the new president to be inaugurated.²

The
Electoral
Count
Act
(1887)

When the excitement died down, public-spirited men of both parties began looking for some way of preventing similar trouble in the future. The problem, however, was a thorny one, and a decade passed before any agreement could be reached. Finally, in 1887, an Electoral Count Act supplied at least a partial solution.³ Recognizing that presidential electors are state officers whose right to act is certified by the governor, and who meet and perform their sole task within the state boundaries and under state authority, the new law placed responsibility for settling disputes as far as possible upon the states themselves. Any determination of a dispute (it provided) in accordance with a state law covering the subject, and arrived at not less than six days before the time fixed for the meeting of the state's electors, should be accepted as conclusive. Manifestly, however, the authorities of a state might fail to arrive at a settlement which everybody would accept, and conflicting returns might still make their appearance at Washington. In such an event, the two houses of Congress, acting separately, were to decide which set of electors was

¹ An act of 1887 requires that two copies of the lists be transmitted also to the secretary of state (at Washington). Formerly, all were sent from each state by special messenger. Under the terms of an act of 1928, however, they began in that year to be sent by registered mail.

² A. C. McLaughlin, *A Constitutional History of the United States*, Chap. XLVIII; P. L. Haworth, *The Hayes-Tilden Disputed Presidential Election of 1876* (New York, 1906).

³ 24 U. S. Stat. at Large, Pt. II, 373-375. The act was passed by a Congress dominated by the Democrats, who always contended that they had been defrauded in 1876.

entitled to be recognized. If, as might easily prove the case, the two houses could not agree, any set of returns having the advantage of being certified by the governor of the state should be accepted; and if no returns came with such endorsement (and the two houses still could not agree on which returns to accept), the state concerned was to lose its vote in that particular election.)

(Although imperfect, this legislation went perhaps as far toward solving the problem as was feasible. There was doubt about the power of Congress under the constitution to exercise control over such aspects of presidential elections, and there was still no guarantee against a state's vote being forfeited because of inability of both the state itself and Congress to resolve a conflict. To be sure, it might be held that if a state cannot settle its own electoral disputes, it may reasonably be expected to shoulder the consequences; and it must be added that to this day only a few of the states have provided by law for handling controversies of the kind. Disfranchisement under any conditions, is, however, undesirable.)

(Ordinarily, of course, the counting of the electoral votes is a mere formality; the country knows a long time in advance what the outcome will be. On the day fixed by law—formerly, the second Wednesday in February, but now the sixth day of January—the members of the two houses gather in the hall of the House of Representatives, with the president (or president *pro tempore*) of the Senate in the chair. Two tellers—a Democrat and a Republican—have previously been appointed by each house. Starting with Alabama, and proceeding in alphabetical order, the presiding officer opens the certificates transmitted by the several electoral bodies, hands them to the tellers (who read them aloud and record the votes), and announces the outcome, which is duly entered, with a list of the votes, in the journals of the two houses. The person receiving the largest number of votes for president, provided the number is a majority of the whole number of electors chosen, i.e., 266 out of a total of 531, is declared elected; and similarly in the case of the vice-presidency.)

The electoral count as now carried out

(In the event that no candidate for president receives a majority, the election is, of course, thrown into the House of Representatives, where each state has one vote, to be bestowed as the majority of the state delegation determines. Until 1804, the choice of the House in such a contingency was to be made between the candidates who were tied, if there was a tie, or among those highest on the list (up to five) if there was simply lack of a majority. The Twelfth Amendment, however, provided for selection among "the persons having the highest numbers not exceeding three." A majority of all the states is necessary to elect.) Since

Provision in case of lack of a majority

¹ Even when there is no dispute, Congress can scrutinize the electoral vote in any state to determine whether it has been "regularly given," i.e., cast, counted, and reported in the manner prescribed by the constitution and laws. If either house decides that in any instance there has been irregularity, the state's votes are not counted.

1801, the president has been chosen by the House only once, *i.e.*, in 1825, when John Quincy Adams emerged victor over Jackson, Crawford, and Clay. (If no candidate for the vice-presidency obtains a majority of the electoral vote, the Senate—the members voting as individuals—choose from the highest two, the victor being required, however, to receive the votes of a majority of the whole number of senators.) Vice-President Richard M. Johnson was elected in this way in 1836.

Some
recent
safe-
guards

Notwithstanding all the constitutional and statutory regulations on the subject, it is still possible for the country to come up to the expiration of a presidential term with no president-elect ready to be inaugurated. Not only may the choice itself still be hanging fire, but a man duly elected may have died before the inauguration date, or may have failed to qualify (as, for example, by refusing to serve). Providing belatedly for such contingencies, the Twentieth Amendment, adopted in 1933, stipulates (1) that in case of the death of a president-elect, the vice-president-elect shall become president, and (2) that if at the time for inauguration a president-elect has not been chosen or has failed to qualify, the vice-president-elect "shall act as president until a president shall have qualified." Conceivably, however, the same situations might arise as to both president-elect and vice-president-elect; and for this contingency the Amendment authorizes Congress to make provision by law—which, nevertheless, it has thus far failed to do.

Proposed Changes in the Method of Electing the President and Vice-President

The
question
of the
electoral
college

Proposals for altering the method of electing the president and vice-president have been discussed from time to time throughout our national history. The Twelfth Amendment remedied certain defects; the Twentieth removed others; and various statutes, notably the Electoral Count Act of 1887 and an act of 1934 passed in pursuance of the new calendar introduced by the Twentieth Amendment, improved matters still further. But the chief anomaly remains. On being asked, the average person would probably reply at once that this anomaly is the electoral college; and there is no denying that that device has never, except at the beginning, functioned as intended, or that, so far as its formal acts are concerned, it could readily be dispensed with. The actual anomaly, however, is not so much the electoral college itself as the practice under which popular votes are translated into electoral votes, which in turn are awarded to candidates on the basis of state-wide pluralities—a principle or plan of translation which, resting as it does on state, not national, authority, could be perpetuated even if the electors themselves were eliminated. The plausible suggestion, often heard, that the electoral college be abolished and the people permitted to choose the president in form as well as in fact therefore touches a matter which is not so simple as it sounds. Should the country be thrown into one grand constituency

and elect by plurality or majority of the total popular vote, with no reference to state lines? Or should voting continue to be by states, and election take place by direct vote of the people on a basis of plurality in a majority of states? Or should the electoral college as such be discarded, yet the popular vote in each state be translated, as now, into electoral votes and the undivided electoral vote of a state be awarded to a candidate receiving a popular plurality in the state? Or, finally, should this last-mentioned plan be followed, except that the electoral votes in a state, be awarded, not on the state-wide principle, but in proportion to the popular vote polled by each of the candidates?

The first of these possibilities, defying all considerations of state interest and pride, may be set down at once as impracticable, even if desirable.¹ The second is objectionable because it would enable a number of the smaller states to swing an election by means of only a minority of the nation-wide popular vote; although it is not to be forgotten that the present system overweights the small states,² and that we have a good many "minority" presidents under it. The third alternative has something to be said for it. It would at least get rid of a fifth wheel to the wagon; and it was in this form that a constitutional amendment sponsored by the late Senator George W. Norris twice narrowly failed to secure the necessary two-thirds vote in the Senate in May, 1934. Greater gain, however, would flow from adoption of the fourth plan enumerated above, *i.e.*, one under which the electoral vote of a state would be computed and allotted on a proportional rather than a general ticket basis and a state's entire electoral vote thus would be prevented from going to a given candidate simply because he happened to obtain a bare plurality of the popular vote, and notwithstanding that he might have run a poor second, or even third, in important sections of the state.³ As Michigan's experience with her law of 1891 reminds us, there is, even now, nothing to prevent a state from independently adopting the proportional principle (the Michigan plan based it on districts)—although the formality of choosing electors could not, of course, be abandoned without amending the federal constitution. But here again the great obstacle is state interest and pride; New York will be a far weightier factor politically if all of her forty-seven electoral votes unfailingly go to the same candidate than if her votes could be divided and scattered; and so with every other state. The same considerations, therefore, that originally influenced one state after another to give up the district

Revival
of the
district
plan de-
sirable
but not
probable

¹ Small states would lose heavily, and large states gain, in electoral power; debarring Negroes from voting as they do, the Southern states would be at special disadvantage. The plan could hardly be operated at all except on the basis of a uniform national suffrage and election law—which, however, certainly could not be secured.

² Because Senate as well as House seats figure in the apportionment of electoral votes.

³ Representative Clarence F. Lea of California, in 1944, reintroduced a constitutional amendment on the lines of this fourth plan.

plan may be counted upon to block any attempt to revive it or anything resembling it, except perhaps locally and sporadically; and one is bound to conclude that, although the way in which we choose our chief executive could undoubtedly be improved in a number of respects, the outlook for reform—beyond a possible discontinuance of the electoral college, which would be relatively unimportant unless the state-wide plurality system were abandoned with it—is not promising.¹

Results of Popular Election in Terms of Presidential Fitness

Under the procedures described, thirty-two different men have attained the presidency—twenty-five by being elected directly to the office and seven by succeeding a deceased chief executive. In exercising their electoral function, what sort of a record have the people established? How do the presidents that they have chosen measure up in terms of capacity, vision, diligence, and other qualities of statesmanship?

An
uneven
record

Some sixty years ago, Mr. (later Lord) Bryce included in his widely influential book, *The American Commonwealth*, a chapter entitled "Why Great Men Are Not Chosen President."² He did not mean to imply that none such is ever chosen. But, looking back over a line of twenty presidents who had served the nation in its first hundred years, our friendly English critic could not see that the people had shown any consistent disposition to elevate even their strongest men (leaving aside the question of sheer "greatness") to the highest office in their power to bestow. Nor do they seem to have developed any such inclination in later days. Through a century and a half, American presidents, another foreign observer affirms, have for the most part been mediocre when compared, for example, with British prime ministers during the same period.³ The judgment may be a trifle severe, but it has enough validity to be disturbing.

Some people believe that if the plan of election originally adopted had been adhered to, the general level would have been higher. Perhaps it would; though there is no way of proving it. In any event, the early rise of political parties and of such party machinery as the national nominating convention doomed that system to eclipse and brought into play a wholly different one under which the president became the choice, not (except in form) of the electoral college, nor yet, in any very exact sense, of the people as a whole, but essentially of a political party which, having made a candidate its standard-bearer, went on to amass enough votes to carry him to victory. To be sure, such a party candidate is initially named by a gathering of delegates presumed to reflect the senti-

¹ On the general subject, see J. E. Kallenbach, "Recent Proposals to Reform the Electoral College System," *Amer. Polit. Sci. Rev.*, XXX, 924-929 (Oct., 1936); L. Rogers and W. Y. Elliott, "Shall We Abolish the Electoral College?" *Forum*, XCVII, 18-22 (Jan., 1937); "Should the Electoral College Be Abolished?" [Symposium], *Cong. Digest*, XX, 67-96 (Mar., 1941).

² Vol. I, Chap. VIII.

³ H. J. Laski, *Parliamentary Government of England* (New York, 1938), 243.

ments of a large segment of the voters. To be sure, too, he cannot reach the White House unless the voters support him in sufficient numbers. But at election time they have opportunity to choose among only two or three or half a dozen candidates picked and put before them; and whoever becomes president does so by virtue of having been chosen in the first instance by a party as an available candidate.

Unhappily, however, the considerations and circumstances making a man available as a party candidate are not always—perhaps not even usually—those that will give him high rank as a president after he is elected. Any one familiar with our national politics can recall plenty of presidential candidates who emerged as party standard-bearers almost as from a lottery. Convention deadlocks among strong candidates open the way for compromise on a weaker one; decisions by bosses in hotel hide-outs are passed on to harassed conventions as virtual mandates; necessity for carrying a large pivotal state may outweigh all considerations of broader statesmanship. In contrast with the English prime minister, who invariably advances to his post of prestige and power along a rugged line of accumulating experience in the House of Commons and in successive higher executive posts,¹ the nominee may have had little or no experience in handling the intricate relations between executive and legislative branches which will become one of his supreme tasks if he is elected.

Under conditions such as these, the rough and tumble of party politics kept Hamilton, Gallatin, Clay, Calhoun, Webster, Seward, Sumner, Hay, and Root from the presidency, while bringing into the office mediocrities like William Henry Harrison, Pierce, Buchanan, Johnson, and Harding. Of course, it is only fair to remember that the system, within three-quarters of a century, gave us Lincoln, Cleveland, the two Roosevelts, and Wilson; also that a good many presidents—Hayes, Arthur, McKinley, and Taft, among more recent ones—while lacking any special claim to distinction, nevertheless proved of at least good average capacity. Perhaps, after all, as Lord Bryce commented in a later book, "things have on the whole gone better than might have been predicted."²

¹ F. A. Ogg, *English Government and Politics* (2nd ed.), 130-133.

² *Modern Democracies* (New York, 1921), II, 73. For an interesting study of the professional backgrounds of American presidents, see S. Herbert, "The Premiership and the Presidency," *Economica*, No. 17 (June, 1926). The writer shows that while our presidents do not uniformly have legislative experience, as do English prime ministers, a majority of them have had such, usually in state legislatures, occasionally in the national House of Representatives, rarely in the national Senate. A great deal of illuminating information on the presidency and its practical workings can be gleaned from A. Nevins, *Grover Cleveland; A Study in Courage* (New York, 1932); *Theodore Roosevelt; An Autobiography* (New York, 1913); H. F. Pringle, *Theodore Roosevelt* (New York, 1931), and *The Life and Times of William Howard Taft* (New York, 1939); W. E. Dodd, *Woodrow Wilson and His Work* (Garden City, 1920); W. A. White, *A Puritan in Babylon; The Story of Calvin Coolidge* (New York, 1938); and *The Public Papers and Addresses of Franklin D. Roosevelt*, 5 vols. (New York, 1938), with supplementary volumes listed on p. 395 below. Cf. O. Strauss, *Under Four Administrations* (New York, 1922).

Qualities
to be
sought
in a
president

Certain qualities, it is manifest, a president must have if he is to be successful, with rare exceptions, he will realize the possibilities of his high office only in the degree to which he possesses them. He must be able; he must be diligent, he must be honest; he must be courageous, he must be tactful; he must be capable of making large decisions promptly, intelligently, and in clear-cut fashion, above all, one is tempted to say, he must be a good politician, adept at working with men, managing them, and inspiring their confidence. Not all presidents, of course, have fully measured up to these requirements. The office has happily been preserved unsullied by personal turpitude; but some incumbents have been too lenient toward self-seeking and corrupt men surrounding them. No president has been wanting in patriotism, but some have lacked courage and decision, and one or two have been notably deficient in tact. Strange as it may seem, two within the recollection of the present generation (Taft and Hoover) were not clever enough at politics for either their own comfort or the country's good.

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erests, since the more populous states were mainly commercial and the less populous ones agricultural.)

(The decision, accordingly, was for two houses; and on the whole it was a wise one. To be sure, bicameralism makes for deadlocks and delays, duplication of effort, and diffusion of responsibility.) A municipality or other local area, having only limited powers, has little need for one house as a check upon another, and many of our cities, large and small, have done away with their former cumbersome two-chambered councils.¹ Indeed, the plan has been challenged in connection with state legislatures as well; and in 1934 Nebraska broke new ground by adopting a constitutional amendment under which, since 1937, the legislature of that state has consisted of but a single house.² In the domain of the national government, however, policies and measures frequently involve such fundamental matters, *e.g.*, the protection of civil rights, that it is a good thing for them to be weighed and shaped and checked by two legislative bodies, approaching them independently, and perhaps from different angles, rather than by only one. Few people seriously suggest that we give up bicameralism at Washington, although plenty of proposals are aimed at overcoming some of its admitted defects.

The House of Representatives

By whom
elected

(The constitution's authors intended the president to be chosen, actually as well as nominally, by a college of electors, and senators by state legislatures. The House of Representatives, however, was designed to spring directly from the people, and accordingly the constitution has from the first provided that its members shall be elected every two years "by the people of the several states," defined as including all persons qualified to vote for a member of the "most numerous" branch of their state legislature.³ Restricted only by the Fifteenth and Nineteenth Amendments prohibiting denial of the right to vote on grounds of race, color, or sex, the different states regulate the suffrage as they choose, primarily for their own legislative and other elections, but incidentally for congressional and presidential elections as well.)

Appor-
tionment
of seats

Although a broadly national, popular body, the House is still further constructed with reference to state lines. Every representative is elected within a given state, and every state has, as such, a definite quota of members.⁴ Provisional quotas were assigned in the constitution, as originally adopted, to serve until a census could be taken; and thereafter

¹ See p. 933 in complete edition of this book.

² See p. 738, *ibid.*

³ Art. I, § 2, cl. 1. The Seventeenth Amendment, under which senators are now likewise chosen by direct popular vote, contains this same provision.

⁴ By courtesy, Hawaii and Alaska are allowed to send one "territorial delegate" each, and Puerto Rico and the Philippines one "resident commissioner" each. Although permitted to speak on matters pertaining to their constituencies, and also to serve on committees, these persons are not full members of the House and consequently are not entitled to vote.

representatives were to be apportioned among the several states "according to their respective numbers," which were to be computed by "adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons."¹ The "other persons" referred to were, of course, slaves; and this provision became one of the important compromises of the constitution. When slavery was abolished, the three-fifths clause was rendered obsolete, and the constitution now provides simply, in the Fourteenth Amendment, for apportionment among the states "according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed."² As we have seen, it provides also for a reduction in the representation of any state which withholds the suffrage from adult male citizens of the United States "except for participation in rebellion, or other crime." Many states are, and have long been, liable to this penalty; but no serious attempt at enforcement has ever been made.³

The constitution does not expressly say that representation in the House shall be reapportioned after each decennial census, but that is clearly what it means; and until the enumeration of 1920, Congress never failed to take the necessary action—usually after an interval of not more than one or two years. The procedure followed varied somewhat on different occasions, but in any case Congress scrutinized the census figures, decided how many members the House should have during the ensuing decade, and, having allotted these among the states as equitably as it could (so that each state should have at least one seat—in accordance with constitutional requirement—and as many more as its population entitled it to), passed an act putting the new arrangements into effect.⁴ It is curious to observe that one of the grounds on which the constitution was opposed during the debates on ratification was that, since the number of representatives might not exceed one for every 30,000 people, the House of Representatives would be too small; one of the best known papers in *The Federalist* was devoted entirely to answering that

The
problem
of an in-
creasing
member-
ship

¹ Art. I, § 2, cl. 3.

² The Supreme Court having held (in *Superintendent v. Commissioner*, 295 U. S. 418, 1935) that all Indians are subject to federal taxation, all were included in the population basis for the apportionment of 1941. It has frequently been proposed that aliens be excluded from the population figures on which apportionments are based—as indeed they are in the case of legislative apportionments in ten states. For this, a constitutional amendment would be required; and one introduced in 1941 by Senator Capper of Kansas was advocated by him on the ground that it is "unfair to American citizens" for states containing numerous aliens to have more votes in Congress on that account. A full discussion of this matter, with a recommendation that the basis of apportionment be made, not population, but votes cast in the last previous presidential election (which, of course, would automatically eliminate aliens), will be found in L. F. Schmeckebier, *Congressional Apportionment* (Washington, 1941), Chap. vi. An effect of shifting to a basis of votes cast might be to stimulate voting; but states in which a substantial share of the potential electorate is deprived of the suffrage by either legal or extra-legal means would suffer proportionate loss of representation, and altogether the change is not likely to be made.

³ See pp. 173-174 above.

⁴ The Senate, of course, concurring.

objection.¹ No longer is there any apprehension on that score; on the contrary, the House has grown to such size (435) that, although it still is not the largest among the world's legislative bodies, there is wide agreement that it contains too many members for the most effective transaction of business.² Partly as a result of the expansion of the country, partly because of the reluctance of states to see their quotas reduced to make room for increased representation of faster growing states, and partly on account of the natural unwillingness of members to legislate themselves or their colleagues out of districts, every reapportionment in our history down to 1930, except one, *i.e.*, in 1842, resulted in a substantial increase.³ Following the census of 1920, no plan could be devised that would not either reduce the representation of as many as eleven states or increase the membership of the House considerably beyond 435. Unwilling to do either, Congress simply drew back from the problem and allowed the country to drift along a full decade without any reapportionment at all.⁴

Present
method
of appor-
tionment

Only in 1929 was the situation remedied—and then only by an act providing for reapportionment under the coming 1930 census, and at decennial intervals thereafter.⁵ In accordance with this legislation (as amended in 1941), reapportionment proceeds as follows: (1) the membership of the House remains fixed “permanently” at 435;⁶ (2) after each census, the Census Bureau in the Department of Commerce prepares for the president a table showing the number of inhabitants of each state and the number of representatives to which each state accordingly is entitled;⁷ (3) the president transmits the tabulation to Congress; and (4) ⁸

¹ No. 1217 (Lodge's ed., 350-355).

² In congressional discussions of the subject, 300 has most often been mentioned as about the right number.

³ It must not be inferred that a state's quota was never reduced. Had the ratio been so maintained that no state would ever have lost representatives, the House would now be two or three times as large as it is.

⁴ The House did, indeed, pass a bill raising the membership to 470, but the Senate refused to concur.

It would always, of course, have been possible to offset an increase resulting from a general reapportionment by enforcing the penal clause of the Fourteenth Amendment, under which the Southern states alone would have lost thirty or more seats. But such action has never been politically feasible. There is no judicial process by which Congress can be compelled to take the step—just as there has never been any by which it could be forced to enact a reapportionment law.

⁵ 46 U. S. Stat. at Large, 21.

⁶ A Congress, however, cannot bind its successors; hence, notwithstanding its declared “permanency,” the number is not to be regarded as necessarily final.

⁷ Computed (since 1941) according to the method of “equal proportions,” rather than that of “major fractions” long employed. These alternative methods of computation have stirred much controversy, among statisticians and political scientists as well as in Congress, but are too mathematically technical to be described here. Not only the methods just mentioned, but three other possible ones which have at times been advocated, are explained in detail, with discussion of their relative merits, in L. F. Schmeckebier, *Congressional Apportionment*, Chap. iv. Cf. Z. Chaffee, “Congressional Reapportionment,” *Harvard Law Rev.*, XVII, 1015-1047 (June, 1929), and E. V. Huntington, *Methods of Apportionment in Congress*, 76th Cong., 3rd Sess., Sen. Doc. No. 304 (1940). The whole difficulty arises, of course, from the fact that seldom or never will any ratio divide exactly into the population of a state, the problem being that of what to do with fractional remainders. In the reappor-

the reapportionment as transmitted goes into effect with the next Congress elected, unless, of course, Congress intervenes with legislation to the contrary. Under this general plan (which has the advantage of preventing the matter from again going by default); a reapportionment based on the 1930 census resulted in a gain of from one to nine seats by eleven states and a loss of from one to three by twenty-one; and another, ten years later, enabled eight states to gain a total of ten seats while ten others were losing one apiece.¹

(Except for requiring direct popular vote, the constitution leaves the "times, places, and manner" of choosing representatives to be determined by the legislatures of the several states)—although with superior authority in Congress to make or alter regulations on the subject.² For half a century, elections were in some states in single-member districts, in others on a general, or state-wide, ticket. But the apportionment act of 1842 required every state populous enough to be entitled to more than one representative to be divided by the legislature into districts "composed of contiguous territory," each returning one member; and the apportionment acts of 1901 and 1911 added the qualifying term "compact." Curiously enough, the act of 1929 failed to use any of the terms "contiguous," or "compact," or "equal"; and when, three years afterwards, an effort was made to have a redistricting law in Mississippi set aside on the ground that the seven congressional districts provided for were not composed of contiguous and compact territory, the federal Supreme Court held that the failure to repeat the requirements in the 1929 act by implication repealed them.³ In legal circles, there had been much doubt on the point; and the country at large was hardly aware of what had happened. In the opinion of the Court, however, the omission had not been inadvertent, but intentional; and since new legislation in 1941 was silent on the subject, the former requirements seem no longer to apply. It may be added that even when federal law on the subject was entirely explicit, Congress made no effort to enforce it upon the states, and that federal district courts holding state reapportionment acts contrary to law because of creating districts lacking in compactness or in equality of population were usually reversed.⁴

General
ticket
and
district
systems

tionment taking effect in 1932, the country-wide ratio (i.e., total apportionment population divided by 435) was 278,376; in that effective in 1942, it was 301,164.

¹ Gains (in 1941): Arizona, Florida, Michigan, New Mexico, North Carolina, Oregon, and Tennessee, one seat each, and California, three seats. Losses: Arkansas, Illinois, Indiana, Iowa, Kansas, Massachusetts, Nebraska, Ohio, Oklahoma, and Pennsylvania, one seat each. For tabulation, see *Cong. Rec.*, 77th Cong., 1st Sess., Vol. 87, Pt. 1, p. 81.

² Art. I, § 4, cl. 1.

³ *Wood v. Broom*, 287 U. S. 1 (1932).

⁴ A state-receiving an increase in its quota of representatives when a reapportionment is made may, until a new districting is carried out, elect its additional representatives at large; and a state suffering a decrease may, similarly, elect its entire quota at large. Hence the congressmen-at-large of whom one occasionally hears. In six states, too, congressmen are elected at large for the reason that the state is entitled to only one seat. All told, there are twelve congressmen-at-large in the Seventy-ninth Congress (1945-47).

Problems
raised
by the
district
system:

1. Diffi-
culties of
redis-
tricting

For reasons to be explained presently, the district system is decidedly better than the general ticket plan. It, however, has drawbacks, chief among which are the difficulties and abuses likely to arise in the redistricting of states whenever a new apportionment changes the number of representatives to which they are entitled. With numerous partisan, sectional, community, and personal interests involved, redistricting is rarely a simple matter; often it becomes one of baffling complexity. By law, the task falls to the state legislatures, which, because of similar conflicts of interest, sometimes entirely fail to carry out needed reapportionments of their own membership, even in the face of a plain mandate of the state constitution. Failure also may mark their efforts to rearrange congressional districts, especially when different parties control the two houses or when legislative majorities and the governor are of opposite political faiths. In 1931, when thirty-two states were confronted with the necessity of redistricting, disputes arose in Missouri, Minnesota, and New York which, in the first two states, were settled only after being carried to the federal Supreme Court, and in the third prevented any reapportionment at all during the ensuing decade.¹

2. Gerrymandering

When redistricting troubles are heard of, one is usually justified in suspecting that the well-known political abuse of gerrymandering has been practiced, or attempted. The name dates from 1812, when Governor Elbridge Gerry of Massachusetts inspired, or at all events endorsed, a notorious piece of partisan districting in his state;² the practice itself goes back even farther. The principle behind the gerrymander is quite simple: "In districting a state or city, spread the majorities of your own party over all or over as many districts as possible. If you have not enough votes to control every district, concentrate the strength of your opponents in as few districts as possible, so that it will do them the least good."³ Plenty of laws have been enacted to curb this practice; but, human nature and party motivations being what they are, the temptation offered politicians who find themselves in a position to control the redrawing of political boundary lines is usually too strong to be resisted.⁴

¹ For a thorough discussion of apportionment *within the states*, see L. F. Schmeckebier, *op. cit.*, Chap. ix. Cf. V. O. Key, Jr., "Procedures in State Legislative Apportionment," *Amer. Polit. Sci. Rev.*, XXVI, 1050-1058 (Dec., 1932).

² One of the resulting districts had the shape of a lizard. "Why, this district looks like a salamander," remarked an observer. "Say rather a Gerrymander," replied an opposition editor, thereby coining a political term which has ever since been current. For a map showing this historic gerrymander, see J. Winsor, *Memorial History of Boston* (Boston, 1880), III, 212.

³ R. C. Brooks, *Political Parties and Electoral Problems* (3rd ed.), 475.

⁴ Party advantage may, of course, arise equally from *failure or refusal* to redistrict, and this suggests what is sometimes called the "silent gerrymander," practiced notoriously in connection with wards of cities and with state legislative districts. In Illinois, there has been no congressional redistricting since 1901; and in 1941, in an injunction suit aimed at forcing action, the state supreme court held that it had no jurisdiction. One district in Chicago at the latter date contained 914,053 people, another only 112,116. Ohio (still using a 1910 map for its congressional elections) has a rural district with 163,000 people and an urban district (Cleveland) with 800,000.

Even the statutory requirement before 1929 that states be divided into districts composed of "contiguous and compact territories" seldom deterred legislative majorities from mapping out sets of districts ingeniously contrived to yield the controlling party the largest possible number of seats at ensuing elections. If the Republicans were in control, they would seek to concentrate the most formidable Democratic strength in a few districts, and to cancel out the remainder by distributing their own strength in such a way as to yield small, but reasonably safe, pluralities in the others. If the Democrats gained the upper hand, they would in turn be likely to shift things around to their own advantage. Redistricting a state, even with the best of intentions, is no easy task. Except in the case of the largest cities, it is not desirable to partition municipalities or counties;¹ yet without doing so it is often impossible to make districts even approximately equal. Any one of several groupings of counties can usually be justified on one plausible ground or another. When to the effort is brought a disposition to gerrymander, the results are sometimes remarkable indeed—districts of grossly unequal populations and of curious and indefensible shapes. As has been pointed out, too, all restraint from national law (never very effective) has now been removed. Unless Congress retraces its steps by reviving the "contiguous and compact" requirement before redistricting takes place under future censuses, legislatures will continue free—except in so far as deterred by state constitutional provisions (as in Virginia) and, of course, by the force of public opinion—to lay out as many "shoe-string," "saddle-bag," and "dumb-bell" congressional districts—unequal, too, in population—as they choose. And even if the legislation is revived, violations of both letter and spirit will reappear unless Congress and the higher courts adopt a new attitude on enforcement.²

Under the general ticket system prevailing in many states before 1842, a party polling a bare plurality of the popular votes for congressmen captured the entire state delegation, notwithstanding that in some sections of the state the candidates of a different party might have been far in the lead; and the main object of Congress in making the district system obligatory was to open a way for parties with such localized strength to win at least a handful of seats. To be sure, the proportioning which results is very rough indeed. The strength of a minority party may be fairly impressive in the aggregate, yet so distributed throughout a state as to yield no district majorities whatever; as, for example, when, in Indiana in 1932, the Republicans cast 683,520 votes for congressmen, yet the Democrats, with 850,183 votes, made a clean sweep of the twelve

The question of fuller representation for minorities

¹ Divisions of the sort sometimes occur; and, of course, large cities, *e.g.*, New York and Chicago, are always divided, usually along ward lines.

² Maps showing the arrangement of congressional districts in the various states, as existing in 1945 (fantastic enough in many cases) will be found in current issues of the *Official Congressional Directory*. One other dubious consequence of the district system, although merely a by-product of it, is the custom which requires congressmen to be residents of the districts which they represent. See pp. 315-316 below.

seats.¹ From this, as well as from inequalities in the total, as also in the voting, populations of districts, it comes about that no House of Representatives, even when newly elected, can claim to mirror the political opinion of the country in more than a very general sort of way.² And one will not be surprised to learn that those who deplore this situation bring forward as a remedy the well-known device of proportional representation, under which, if adopted for congressional elections, there would be a return to the general ticket plan, coupled, however, not with plurality election, as in earlier days, but with some method of allotting seats (in multi-member districts or on a state-wide basis) in a fixed proportion to the popular votes polled by the various tickets. Geographical districts are, at best, an artificial and arbitrary basis of representation; only where there is a fair degree of economic and social homogeneity, as, for example, in an extensive farming area, can the elected representative claim to speak for a genuine community opinion, except perhaps on an occasional issue. On the other hand, it may be argued that party divisions at the polls often fail to reflect any genuine division of interest or opinion; so that any allocation of seats in accordance with party labels will fall short of giving the truest sort of representation. In addition, it may be objected that proportional representation, by opening a way for minor groups to obtain seats, would make for a multi-party system and for the rule of *blocs*, and that in the half-score American cities where the plan has been tried the results have not always been encouraging.³ Congress could, of course, in some future reapportionment act, require the states uniformly to elect according to the proportional plan. There is no present prospect of this being done; but, short of it, existing law might be changed so as to permit election either by districts or otherwise, thereby opening a way for individual states to experiment with a proportional scheme if they so desired.⁴

Congress has gone farther, in regulating congressional elections, than merely to require use of the district system. In 1872, it enjoined that

¹ A clean sweep, indeed, occurred five times in the state mentioned between 1910 and 1932, and never with the majority party polling more than 55.6 per cent of the votes cast. See L. E. Lambert, *The Congressional District System in Indiana* (Bloomington, Ind., 1943).

² In the elections of 1942, Republican congressional candidates throughout the country polled 1,267,000 more votes than did their Democratic opponents. Yet the Democrats won 224 seats, the Republicans only 207, and Democratic control of the House remained intact.

³ See p. 215 below, and cf. J. P. Harris, "The Practical Workings of Proportional Representation in the United States and Canada," *Nat. Mun. Rev.*, Supp., XIX, 335-383 (May, 1930).

⁴ For a comparison of the party complexion of Congress after the 1930 election with what it would have been under proportional representation, see *Proportional Representation Rev.*, 3rd ser., No. 99, 46 (July, 1931), and for a similar comparison based on the 1932 election, G. H. Hallett, "Is Congress Representative?," *Nat. Mun. Rev.*, XXII, 284-288 (June, 1933). In the latter instance, the Democrats would have come off with 268 seats instead of 313, and the Republicans with 159 instead of 117. Cf. V. Torrey, *You and Your Congress* (New York, 1944), Chaps. v-vi.

all such elections be by secret ballot; ¹ in 1873, that they be held throughout the country on the same day, namely, the Tuesday following the first Monday in November of every even-numbered year ² (previously, voting was in some instances *viva voce*, and elections were held at widely varying dates); and in 1910-11, that candidates should not allow their expenditures to exceed \$5,000, exclusive of necessary personal outlays. Candidates are nominated as the laws of the several states provide; for although, as has appeared, Supreme Court decisions of the past five or six years seem clearly to open a way for congressional regulation of nominating procedures,³ no national legislation on the subject has as yet been enacted. In most cases, the direct primary is employed; but in several states the nominations are still made by district nominating conventions composed of delegates representing counties, towns, or other subdivisions.

Further congressional regulation of elections

The constitution makes the House of Representatives the judge of the "elections, returns, and qualifications" of its members.⁴ Accordingly, every dispute involving a seat is decided by the House itself. If a candidate is unwilling to concede his defeat, he may ask for and obtain a local recount of the votes as provided for in the state election laws, and if still dissatisfied, he may carry his case to the House, where it will be considered by one of three standing committees on elections maintained for the purpose. The committee (composed of six majority and three minority members) weighs the evidence, hears the claimants and their counsel, takes other testimony if desired, and prepares a report in favor of one candidate or the other, which the House usually accepts. Party considerations are likely to have much to do with the decision, and the English plan of turning over such cases to a non-partisan and disinterested board of judges is considerably better.⁵

Contested elections

No election Tribunal

✓ Four qualifications, including one of a negative nature, are required of a representative by the constitution. He ⁶ must be twenty-five years of age, or over (if not when elected, at all events when he takes his seat); he must have been a citizen at least seven years (not necessarily immediately preceding election); he must be, at the time of his election, a legal resident for voting purposes (not merely an inhabitant) of the state in which he is chosen; ⁷ and he cannot, while a member of the House, hold any "office under the United States." ⁸ The last-mentioned restriction

Qualifications of members

¹ This does not preclude the use of voting machines.

² Unless the constitution of a state fixes a different date, as is true in Maine, where election day is the second Monday in September.

³ See p. 170 above.

⁴ Art. I, § 5, cl. 1.

⁵ V. M. Barnett, Jr., "Contested Congressional Elections in Recent Years," *Polit. Sci. Quar.*, LIV, 187-215 (June, 1939).

⁶ Women are eligible on the same terms as men, and a considerable number have been elected. See p. 163 above.

⁷ Art. I, § 2, cl. 2.

⁸ Art. I, § 6, cl. 2. A state office does not disqualify. The purpose of the restriction mentioned is to uphold the principle of separation of powers by keeping the legislative and executive branches apart. A member of Congress may accept appointment

is construed to debar army and navy officers, as well as holders of civil office; and it is hardly necessary to point out that, in disqualifying heads of executive departments, it contrasts sharply with the unwritten rule in Great Britain which requires ministers to have seats in Parliament.¹

Can other qualifications be required?

On sundry occasions the question has arisen whether qualifications in addition to those stipulated in the constitution can be imposed. The answer is both no and yes. On the one hand, plenty of court decisions lay it down as a principle of law that neither the states nor Congress can add to or subtract from the qualifications enumerated.² On the other hand, usage, as every one knows, has decreed almost inexorably—notwithstanding complete silence of the constitution on the subject—that members shall be residents of the districts which they represent.³ Furthermore, in passing upon the qualifications of newly chosen members, the House may also, as a matter of practice, make additions; at all events, it did so in 1900, when it refused to seat Brigham H. Roberts of Utah on the ground that he was a polygamist, and again in 1919, when Victor L. Berger of Wisconsin was excluded because of having been judicially convicted of sedition and disloyalty.⁴ To be sure, these decisions were of doubtful constitutionality. The proper procedure would seem to be to seat an objectionable person and then expel him. But the actions taken in the cases mentioned stand on the record as evidence that, regardless of both the theory and the law of the matter, the House can actually impose a test for admission of which the constitution makes no mention. Some states, too, on their part, have translated into law the custom requiring members to be residents of the districts which they represent.⁵

The Senate

Equal representation of the states

With its members not only chosen by direct popular vote but distributed among the states in proportion to population, the House of Representatives is—as the constitution's framers intended it to be—a broadly national body, with state boundaries merely incidental to the basis on which it rests. The Senate, on the contrary, was designed to be more in the nature of a council of states, grounded upon the principle of federalism; and not only were its members to be chosen by state legislatures, rather than by the people directly, but all states were given equal representation, regardless of size or population. Each state was allotted two

to a federal office, provided it is not one which has been created, or the emoluments of which have been increased, during the term for which he was elected, and provided, of course, he resigns his congressional seat. A federal officer may be elected to Congress, but must resign his office when taking his seat.

¹ Officers under the Crown, other than ministers, are, however, debarred from the House of Commons. See F. A. Ogg, *English Government and Politics* (2nd ed.), 135.

² *E.g.*, *Thomas v. Owens*, 4 Md. 189 (1853).

³ See pp. 315-316 below.

⁴ The Supreme Court eventually cleared him, and after being elected a third time by his district, he was seated.

⁵ In so far as merely declaratory of existing practice, such state regulations are harmless enough; if judicially tested, they, however, would almost certainly be declared unconstitutional.

senators; and none might be deprived of its equality in this respect except with its own consent. To be sure, the federal principle was not carried as far as some of the small-state people desired: senators were to vote as individuals and not by states, and their salaries were to be paid out of the national treasury rather than by the states individually. But equal representation and voting power for all states, large and small, populous and otherwise, made the Senate a truly federal body; and such it remains today, notwithstanding that in one important respect, *i.e.*, direct popular election of its members, its position has since 1913 come to be more like that of the other branch.

To many people in all periods of our national history, this equality of unequals has seemed unreasonable, and in fact indefensible. To begin with, Alexander Hamilton has been proved right in his contention—contrary to prevailing opinion in his time—that, once the new government was in operation, there never would be a conflict of interests between large states and small states as such. Throughout our history, cleavages have run on quite different lines. They have been regional, or sectional, *e.g.*, between parts of the country that were mainly agricultural and other parts devoted chiefly to industry and trade. Whether a state was large or small has made little or no difference in its political attitudes and alignments. And so it very well can be argued that the precaution taken by the constitution's authors for the protection of the small states is unnecessary and need not be perpetuated.

2 In the second place, the spread between the smallest and largest state populations has grown far greater than was ever anticipated, with equality of representation correspondingly more incongruous, at least as a matter of mathematics. New York, with 13,479,142 population (in 1940), has two senators; Nevada, with 110,247, also has two senators. Pennsylvania has about a million and a half more inhabitants than all New England; but New England has twelve senators and Pennsylvania two. The six states of New York, Pennsylvania, Illinois, Ohio, Texas, and California have over fifty million inhabitants, or nearly forty per cent of the total population of the continental United States. Yet, in a Senate of ninety-six members, they have only twelve, *i.e.*, about twelve per cent. A Senate majority could, indeed, be made up to represent not more than one-fifth of the people of the country. More significant, too, than this mere disproportion of numbers is the distorted representation given major economic and social interests. Industry and commerce preponderate in only a few, but usually densely inhabited, states; agriculture preponderates in many states, more sparsely populated; and equality of state representation in the Senate inevitably gives rural interests disproportionate influence in that body.

People who have been troubled about this situation have suggested various remedies, among them that a state be allowed an additional senator for every million inhabitants in excess of some fixed number. This

Criticism
of the
arrange-
ment

Proposed
changes

would not result in an exact proportioning such as is presumed to apply in the case of the House of Representatives, but it would materially alleviate the existing inequalities; and at first glance the proposal seems reasonable. If carried out, it would have the undoubted advantage of introducing a fairer balance between rural and urban, agricultural and industrial, interests. There are, however, several things to be noted before conclusions are reached. ~~In~~ In the first place, the number of senators would be greatly increased, and such efficiency as the Senate now shows as a deliberating and revising body would be seriously impaired. ~~In~~ In the second place, ~~(the change)~~ added to popular election of senators, as already provided for by the Seventeenth Amendment—~~would~~ tend to make both houses representative of the same people in the same proportions, and hence would remove one of the main reasons for having a second chamber at all. Criticism of the existing arrangement commonly springs from the idea that representation, to be worthy of the name, must be based on and proportioned to numbers; whereas there is no essential reason why a senator may not quite as satisfactorily represent 5,000,000 people as 500,000, just as the president sometimes better represents the people of the entire nation than do several hundred locally elected congressmen.

3/ Finally, the question is hardly more than academic, for the reason that the proposed change, requiring not only a constitutional amendment but the express consent of every state whose representation would become less than that of some other state, would be practically impossible to bring about.¹

Original
mode of
election

Five or six different ways of choosing senators were considered by the constitution's framers, and election by the state legislatures was finally hit upon as the least objectionable, with the proviso that a vacancy arising in any state, by resignation or otherwise, when the legislature was not in session should be filled by temporary appointment by the governor.² Certain distinct advantages were, indeed, expected to flow from this method of selection. Members of legislatures, it was thought, would be most likely to know the qualifications of senatorial candidates, and, being themselves men of substance and responsibility, would choose persons of superior character, and especially of conservative temper. Elected by the legislature, a senator would feel himself the representative, not of a faction or group or section, but of the entire state. The national and state governments would be geared together in a significant way, and people who were troubled lest the strengthening of the former might lead to eventual extinction of the latter (such fears have not been confined to the days of the New Deal) would find ground for reassurance.

¹ Some redistribution of voting power in the Senate might conceivably arise in future from the creation of metropolitan states, such as New York, Chicago, and Detroit. The constitution guarantees equal representation of the states in the Senate, but does not obstruct partitioning of states, beyond requiring the consent of the legislature of any state affected.

² Act I, § 3, cl. 2.

These considerations were plausible, and in the testing period of the Republic they had genuine weight. (Later on, they seemed less important; and as the popular basis of government broadened, the conviction grew that senators, like representatives, ought to be chosen by the people directly.) This view was not based merely upon theory. Legislative election developed many practical drawbacks and abuses—deadlocks leaving senatorial seats vacant for years at a time,¹ control of elections by bosses and corporations, virtual purchase of seats, absorption of the legislatures in senatorial elections to the neglect of other business. As early as 1826, proposals for direct popular election were heard, and after the Civil War the matter became a theme of frequent discussion. Between 1893 and 1912, the House of Representatives five times passed resolutions submitting a constitutional amendment on the subject; and though the Senate invariably refused to concur, political parties endorsed the reform in their platforms and two-thirds of the state legislatures went on record in favor of it.

Move-
ment
for direct
popular
election

Meanwhile, a number of states, chiefly west of the Mississippi, worked out a plan under which popular election was attained, to all intents and purposes, regardless of the fate of the proposed amendment. The means employed was the direct primary. By a state law, the voters of each party were authorized to indicate at the polls which of the party candidates for a senatorship they preferred, and the nominations thus made were formally reported to the legislature. Usually that body was trusted, without any special precaution, to execute the public will by electing the designated candidate of the majority party. Oregon and Nebraska, however, introduced a plan under which candidates for the legislature were asked to pledge their support in advance to the "people's choice," irrespective of party. In either case, there was, as with presidential electors, no obligation other than moral; legally, the legislature remained free to elect whomsoever it would. But the popular will was almost invariably carried out. By 1912, senators were nominated popularly in a total of twenty-nine states, scattered throughout the country, and election by the legislatures was fast coming to be quite as much a fiction as is the choice of the president by the electoral college.

Rise of
nomina-
tion by
direct
primary

Under these conditions, the opposition in the Senate weakened. Many of the members recognized that they were, in effect, already elected by the people; and in 1912, over the opposition of the party leaders and bosses, the Seventeenth Amendment passed both houses of Congress, and in 1913 was proclaimed in force. Under the new arrangement, senators are chosen directly by the people of the several states; and, as is the case

The
Seven-
teenth
Amend-
ment

¹ Notable deadlocks of the kind included one in Pennsylvania in 1899, when a successor to Senator Quay was to be elected, and one in Delaware, where J. E. Addicks kept up a running fight for a senatorship from 1895 to 1903. An act of Congress passed in 1866 stipulated that if the two houses of a legislature, voting separately, should find themselves unable to elect a senator, they should meet in joint session and elect by majority vote. Even in joint session, however, it might be difficult or impossible for any candidate to emerge with a majority.

in the election of members of the House of Representatives, the electors include all persons qualified to vote for members of the "most numerous branch of the state legislature." If a vacancy arises, the governor of the state issues writs of election to fill it for the remainder of the unexpired term. The legislature may, however, empower him to make temporary appointments; and most legislatures have done this.

Results
of the
new
system

The effects of the change to direct popular election cannot be measured with precision. Liberation of the state legislatures from the distractions entailed by senatorial elections has been a genuine gain. Deadlocks have been made impossible, and a state's full representation at all times (except for brief intervals following the death or resignation of a senator) has been assured. The consequences for the Senate itself are not so clear. Since 1913, several hundred senators have been elected or reelected. But whether they have been of higher quality than they would have been under the old method of election, no one can say. Certainly the amendment produced no rapid shift of personnel. Practically every senator who could have expected to be continued in office at the hands of his state's legislature was continued on the popular basis; indeed, contrary to expectation, reelections have consistently been more numerous under the popular system than before.¹ Furthermore, abuses arising from the lavish use of money in senatorial nominations and elections did not disappear, as is evidenced by the Newberry controversy of 1918-22, the cases of William S. Vare of Pennsylvania and Frank L. Smith of Illinois in 1926-29, and other somewhat less noted instances.² Money is employed in a different way, because it is now the state-wide electorate that has to be reached; and in this situation considerable outlays become not only inevitable, but justifiable. Speaking broadly, however, senatorial politics tends to remain a game for the well-to-do, or at all events for those able

¹ R. E. McClendon, "Reelection of Senators," *Amer. Polit. Sci. Rev.*, XXVIII, 636-642 (Aug., 1934).

² In winning a senatorial seat in Michigan in 1918, Truman H. Newberry spent something like \$195,000—an amount far in excess of that recognized as a legitimate electoral outlay by Michigan law, as also by the federal statute of 1910, which in point of fact fixed the figure at \$10,000. Most of the amount was poured out in securing the nomination in a primary in competition with Henry Ford. Convicted under the federal law in a lower court, Newberry appealed to the federal Supreme Court, which in 1921 set aside the conviction, four of the nine justices being of the opinion that Congress lacked power to regulate nominations and a fifth concurring for a different reason (*Newberry v. United States*, 256 U. S. 232). When finally seating the defendant by a close vote in 1922, the Senate passed a resolution declaring his outlay in quest of his nomination excessive, contrary to sound policy, and dangerous to free government; and in the end, Newberry decided that his seat would not be comfortable and resigned. A full account of the affair will be found in S. Erwin, *Henry Ford vs. Truman H. Newberry* (New York, 1935). By votes of 53 to 28 and 56 to 30, on December 7 and 9, 1927, the Senate refused to seat Vare and Smith, respectively, on charges of improper receipt and use of large sums of money in securing nomination and election; and prolonged subsequent investigations and controversies failed to bring a reversal of the decisions. See C. H. Wooddy, *The Case of Frank L. Smith; A Study in Representative Government* (Chicago, 1931). Campaign expenditures of Senator Joseph R. Grundy of Pennsylvania, and of Mrs. Ruth Hanna McCormick of Illinois, stirred much comment in 1930, and in the latter case were subjected to an official investigation.

to muster strong financial support. Certain undesirables, *e.g.*, self-seeking plutocrats and virtual appointees of avaricious capitalistic interests, are now pretty well excluded; but others, *e.g.*, the demagogue, the whirlwind campaigner, and especially the shrewd manipulator of federal patronage,¹ have perhaps better chances than before. Popular election is of itself no guarantee of fitness; and whether, over a prolonged period under that system, the upper house will show a higher level of ability, integrity, and achievement than in the days of Webster, Clay, and Calhoun, or of Allison, Spooner, and Hoar, remains to be determined. The prospect that it will do so is not particularly flattering.

The term of senators is six years. Some of the framers of the constitution favored a longer period; indeed, a few advocated election for life.² But to most persons six years seemed sufficiently long to insure the desired stability and continuity. A term of such length puts a senator in a very different position from a representative. Unlike the latter, he has time in a single term to acquire experience, and even to attain a certain degree of prominence; and he can devote himself for several years to public affairs without too much distracting anxiety over reelection. Most senators, furthermore, have more than one term, and periods of service running to eighteen, or even twenty-four, years are not uncommon.³ Continuity of personnel arising from long terms and numerous reelections is further secured by an arrangement under which the terms of one-third of the members expire biennially, with the result that the Senate never finds itself in the position in which the House of Representatives is found every two years—a new body, with greatly altered membership, obliged to organize from the ground up.⁴ On the contrary, it is continuous and always organized. Considerably more than two-thirds of its members at any given time have served at least as long as two years; leadership develops slowly and as a rule changes gradually; precedents and traditions are carried along on the current of a never-ending stream.

Senators must be at least thirty years of age, and must have been citizens of the United States at least nine years. Otherwise, their constitutional qualifications are identical with those of representatives. They must be inhabitants of the states that elect them, and during their tenure they may not hold any office under the United States. Like representatives, too, they may not at any time be appointed to a civil office under

¹ Developments in the civil service have, however, narrowed the possible scope of such activities. See Chap. xxii below.

² In 1944, Senator E. D. Smith of South Carolina, failing of renomination, retired from the body after thirty-six years of continuous service. The average turnover in the Senate from 1790 to 1924 was 27.2 per cent. In the Fifty-first Congress (1889-91), it fell to the low figure of 10 per cent. The average turnover in the House between 1790 and 1924 was 44 per cent. Cf. the study by McClendon cited above.

³ The original senators were divided into three classes, with terms expiring in two, four, and six years respectively. In no case were both senators of a state placed in the same class, and the senators of states admitted later were always assigned, by lot, to different classes. Hence, barring vacancies arising from death or resignation, only one senator is elected in a state in any given year.

the authority of the United States which shall have been created, or the emoluments whereof shall have been increased, during the time for which they were elected.¹ Equally with the House, the Senate is judge of the elections, returns, and qualifications of its members;² and here also the question has arisen whether qualifications can be imposed in excess of those prescribed by the constitution. We have seen that the House once took the doubtful course of refusing to seat a member-elect because he was a polygamist. Asked, in 1903, to seat a senator-elect (Reed Smoot) who, although not a polygamist, was known to be an adherent of the Mormon Church, the Senate took what seems to be the better constitutional ground, namely, that any person duly elected and having the qualifications required by the constitution must be received, even though he may subsequently be expelled. In refusing in 1927-29 to seat Frank L. Smith of Illinois and William S. Vare of Pennsylvania, who, although duly certified as elected, had allowed too much money to be spent in behalf of their respective candidacies, the upper house seemingly receded from its previous more correct position—although effort was made to justify the course taken on the ground that improper receipt and use of funds had invalidated the election of both men. However, when, in 1941, it seated William Langer of North Dakota, elected regularly enough, but charged (by a group in his own state) with being unworthy of membership, it reverted to its earlier more defensible practice.³ Expulsion of a senator or representative requires a two-thirds vote and may be for any cause. But neither senators nor representatives are regarded as civil officers of the United States, in the meaning of the constitution, and consequently they are not subject to impeachment.

Status of Members of Congress—Other Aspects

Privi-
leges and
immuni-
ties

Members of both houses have certain privileges and immunities, based on hard-won English usages, and aimed at protecting freedom of attendance, speaking, and voting. A senator or representative may be arrested at any time for treason, felony, or breach of the peace—which, as construed, means indictable offenses of every sort;⁴ so that he enjoys no exemption from the processes of the criminal law. But while attending

¹ In 1909, President Taft appointed Senator Philander C. Knox secretary of state, notwithstanding that the salaries of heads of executive departments had been increased while the appointee was in the Senate. The constitutional difficulty was got around, somewhat equivocally, by an act of Congress reducing the stipend of the secretary of state, during Knox's incumbency, to the earlier figure. On questions raised by the appointment of Senator Hugo L. Black as associate justice of the Supreme Court in 1937, see D. O. McGovney, "Is Hugo L. Black a Supreme Court Justice *De Jure*?" *Calif. Law Rev.*, XXVI, 1-32 (Nov., 1937).

² Contested elections are investigated and reported upon by the standing committee on privileges and elections.

³ The charge against Langer was that, when attorney-general and later governor of his state, he had allowed his official actions to be influenced by his interest in various business deals. The Senate committee on elections recommended that he be unseated, but the recommendation did not finally prevail.

⁴ *Williamson v. United States*, 207 U. S. 425 (1907).

a session, or going to^{*} or returning from a session, he cannot be arrested on civil process or compelled to testify in a court or serve on a jury.¹ Moreover, "for any speech or debate in either house" he cannot "be questioned in any other place."² That is, he cannot be proceeded against, outside of the house to which he belongs (it, of course, may censure or even expel him), because of anything he may have said in the course of debate, committee hearings, or other proceedings properly belonging to the business of the house. He cannot, for example, be sued for libel or slander by a person whom he may have criticized. The exemption is sometimes used as a shield for unwarranted personalities, and even for downright scurrility, but it is fundamentally justifiable. If a member knew that he might be proceeded against at law by any person taking offense at his remarks in the exercise of his proper functions, he would speak and act (in view of the general publicity of congressional proceedings which now prevails) under an altogether undesirable sense of restraint. The immunity relates, of course, to legal proceedings only, and quite properly confers no protection against criticism by press and public on grounds of public interest and policy.

One other constitutional right of members is that of receiving compensation for their labors, at a rate fixed by law (of their own making) and paid out of the national treasury. Until 1855, they contented themselves with a small per diem allowance, but at that time a salary of \$3,000 was authorized, which in 1865 was increased to \$5,000, in 1907 to \$7,500,³ and in 1925 to \$10,000 (in the case of the speaker of the House of Representatives, and likewise the president *pro tempore* of the Senate when there is no vice-president, \$15,000).⁴ Members of the two houses

Pay and
perqui-
sites

¹ In 1929, Senators Coleman L. Blease and J. Thomas Heflin, having made charges relating to liquor and crime scandals in the national capital, were subpoenaed to appear before the District of Columbia grand jury. They refused to comply, and the District supreme court held that they were within their rights, since they could not be compelled to appear except by being placed under arrest, and could not be arrested while Congress was in session except for treason, felony, or breach of the peace. In 1933, Senator Huey P. Long, while attending a session of Congress, was served with a summons in an action for libel. To his contention that the summons was void because of his constitutional immunities, the federal Supreme Court replied that these immunities exempted him only from arrest. *Long v. Ansell*, 293 U. S. 76 (1934). In 1941, Representative Hamilton Fish was served with a subpoena calling on him to testify before a District of Columbia grand jury in connection with an investigation of alleged Nazi propaganda in the United States. After temporarily instructing him to refuse to respond, the House of Representatives authorized him to testify at any time when that body was not in session.

² Art. I, § 6, cl. 1.

³ This level was first reached under a "salary grab" act passed by a "lame-duck" Congress in 1873, but public disapproval was so strong that the next Congress restored the previous figure.

⁴ In an important report entitled *The Reorganization of Congress* (Washington, D. C., 1945), p. 47, a committee of the American Political Science Association recommended that the salary of all members be increased to \$12,500 (a bill providing for that figure was introduced in the House in 1945), or preferably to \$15,000. The figure \$20,000, too, has been responsibly proposed. Demonstrating that senators and representatives can hardly live, even frugally, on their present salaries, the committee advocated also a system of congressional pensions. In 1942, Congress did go so far as to amend a Civil Service Retirement Act to provide annuities on a

have always been paid at the same rate. In addition to salary, there are generous perquisites—some quite necessary and proper, others less so. One is a travel allowance of one round trip each session between the member's home and Washington at the liberal rate of twenty cents a mile—intended, however, to help meet the cost of transporting the member's family. Another is an allowance of \$9,500 a year for representatives and of at least \$14,340 a year for senators for clerk hire, with more for committee chairmen.¹ A third is the franking privilege, enabling members to send free through the mails various materials (not merely reading matter, but personal and household effects) stamped with their names, and tantamount to a substantial subsidy. In addition, there is free stationery, free telegraph and telephone service, an occasional chance to "see the world" at government expense by going on inspecting or investigating tours—even some possibility of an imposing public funeral if one has the melancholy luck to die in office! The use occasionally made of these perquisites inspires a good deal of criticism. Clerk hire, it is thought, goes too largely to members' relatives doing little work and sometimes not even living in Washington; the franking privilege burdens the government with distributing tons of documents sometimes consisting of speeches never delivered and intended merely to impress constituents, or even of pressure-group propagandist pamphlets which a member has been prevailed upon to sponsor for mailing purposes; investigating trips, upon being themselves investigated, sometimes turn out to have been only costly "junkets." With the country's tax load and debt burden at all-time peaks, Congress will do well in future to observe every reasonable propriety in such matters.

Congressional
personnel

What kinds of men and women do the voters send to Washington to represent them in the House and Senate? One might reply, "Nearly all kinds"; for the 531 representatives and senators constitute in many ways (although not in all) a good cross-section of the nation itself. A recent careful study of a particular Congress (the Seventy-seventh, 1941-43) brought to view characteristics that can safely be regarded as those of Congress generally under present-day conditions;² and a few of them may be noted here. To begin with, the average age of representatives was fifty-two and of senators fifty-eight—which is far beyond the average adult age (forty-three). Nearly all were firmly rooted in the states, and even in the localities (in the case of representatives), which they represented, by virtue either of having been born there or of having

graduated scale for retired members after as much as fifteen years of service. A storm of public disapproval of this alleged "pension grab" caused the amendment to be repealed within less than two months. Any person acquainted with the facts knows, however, that an arrangement of the kind would be justifiable, at all events unless the salary now paid were to be increased by at least fifty per cent.

¹ The allowance for senators from states with a population of more than four million is \$15,360. The present figures for clerk hire are fixed in *Public Law 512*, 78th Cong. (1944).

² M. M. McKinney, "The Personnel of the Seventy-seventh Congress," *Amer. Polit. Sci. Rev.*, XXXVI, 67-75 (Feb., 1942).

become resident there at an early age. Different religions were represented in rough proportion to their numbers of communicants throughout the country. In other ways besides age, the situation was less typical of the general body politic. Eighty-eight per cent of the representatives and senators had attended a college, a professional school, or both—which, of course, is a far higher proportion than among people generally. As one would expect, a disproportionate number had held previous public positions of one kind or another; for example, 156 had served in state legislatures and 109 as prosecuting attorney. Vocationally, the outstanding fact was the preponderance of lawyers—although not all of the 311 members listed as such were actively practicing at the time of their election. Other professions were represented more sparingly, and along with them, a variety of business and financial interests. Although “dirt farmers” were not numerous, agriculture claimed approximately one-tenth of the membership—with, of course, all members from agricultural states counted upon to be sensitive to agricultural interests. The man most conspicuously absent was the manual laborer: only a single member listed himself as a factory worker, although probably a few others had at one time or another been such. Hardly any interest is more vocal around the Capitol than labor. But those who speak for it do so either as lobbyists from the outside or as members concerned about labor-employer relations and policies without themselves ever having riveted a girder or stood at the assembly line. And at this point, Congress contrasts sharply with the British House of Commons, which for more than a generation has contained sizeable numbers of members not only belonging to trade unions and the Labour party, but drawn directly from labor ranks.

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CHAPTER XV

THE ORGANIZATION OF HOUSE AND SENATE

Under terms of the constitution, Congress meets in regular session ^{Sessions} once a year and in addition may, "on extraordinary occasions," be called into special session by the president. Until 1933, the first regular session of a Congress, starting on the first Monday of December of the odd-numbered year following election, usually lasted through most of the ensuing summer, and was commonly referred to as the "long" session; the second regular session, opening in December of the next even-numbered year, lasted only until March 4, when the terms of all members of the House and of one-third of the senators expired, and accordingly was known as the "short" session. This archaic arrangement, under which—unless sooner called into special session—a new Congress did not meet until thirteen months after it was elected, has now been dispensed with, and by provision of the Twentieth Amendment¹ the terms of all representatives (and of one-third or more of the senators) begin on January 3 following election, with the first regular session of a new Congress starting on the same day unless a different date has been agreed upon by the two houses. The second regular session operates on a similar schedule the next year;² and both sessions may run as long as desired within a twelve-month period.³ At one stroke, the present system does away with the old rigidly limited and largely futile "short" session, puts an end to legislation by "lame-duck" members defeated for reelection, and reduces the need for special sessions except at times of genuine emergency.⁴ Since

Improved
arrange-
ments

¹ See p. 45 above. Once before the states, this amendment (sponsored most vigorously and persistently by the late Senator George W. Norris of Nebraska) was ratified with an alacrity which showed that the country was fully ready for it.

² By agreement, the second session of the Seventy-seventh Congress opened on January 5 (instead of 3), 1942, and the first session of the Seventy-eighth on January 6, 1943. On the general subject, see E. S. Brown, "The Time of Meetings of Congress," *Amer. Polit. Sci. Rev.*, XXV, 955-960 (Nov., 1931).

³ Each regular session may be counted upon to extend from January into the following summer, with a tendency, under normal conditions, to shorten up in alternate years when a national election is impending—Congress thus being in session, on the average, about half of the time. Under pressure of defense preparations and of war, the sessions of 1940 to 1944, inclusive, lasted either a full year or nearly so, but with summer or autumn adjournments of several weeks in 1943 and 1944 and an interval in each of the other years during which only "token" meetings were held.

⁴ Either house, it should be observed, may be called into special session without the other, and in practice the Senate is so convoked, as occasion requires, to act upon executive appointments and treaties—matters with which the House of Representatives, as such, has nothing directly to do. A special session of a single house is not, of course, a special session of Congress. For a list of special sessions of the Senate from 1791 to 1933, see *Official Congressional Directory*, 1st ed. corrected to Feb. 2, 1945, p. 252. Unlike state legislatures, which, when called into special session, can commonly deal only with matters specified by the governor in the call, Congress, when so convened, is in full possession of all its constitutional powers.

the first one met in 1789, Congresses have been numbered consecutively; and the sessions of each are identified officially as the first or second (or third) as the case may be. The Congress elected in November, 1944, is the Seventy-ninth.

Adjourn-
ment

Unlike certain national legislatures in the past (*e.g.* in France), Congress is not obliged to remain in session during any fixed portion of a year. Unlike certain parliaments once existing, too, neither branch can be dissolved, or have its sessions suspended or prorogued, by the executive. Neither house may adjourn without the consent of the other for a period longer than three days, or to any other place than that in which the houses are at the time sitting. Otherwise, the matter of adjournment is left to arrangement between the houses themselves, save only that when they cannot agree as to the time of adjournment, the president may intervene and adjourn them to "such time as he shall think proper."¹ No occasion for exercise of this particular presidential authority has ever arisen.

How a New Congress Is Organized

Need for
organiza-
tion in
legis-
lative
bodies

Whatever its numbers, its tasks, or its powers, a deliberative assembly such as the House of Representatives or the Senate can make headway only by means of some plan of organization that will transform an amorphous crowd of members into an integrated working body. There must be officers to direct proceedings, maintain order, and keep records. There must be generally accepted rules of procedure. There must be facilities, chiefly committees, for parcelling out tasks too numerous, intricate, or otherwise exacting to be performed in their entirety by the membership as a whole. The constitution requires the House to have a speaker as its presiding officer, makes the vice-president of the United States the president of the Senate, and requires the latter body to have a president *pro tempore* to serve in the absence of the vice-president.² Beyond this, however, each branch is at liberty to provide itself with such officers, set up such committees, adopt such forms of procedure, and impose upon itself such rules as it sees fit, subject only to the limitation that "it may not by its rules ignore constitutional restraints or violate fundamental rights."³ By the same token, each has enjoyed virtually unrestricted scope for acquiring, by deliberate decision or, more commonly, by gradual and more or less casual growth, a rich equipment of informal mechanisms and unwritten customs which quite as often account for what the observer hears and sees on Capitol Hill as does anything to be found in the official code of rules.

One who would understand the machinery with which Congress carries on its work will do well to begin by noting how a newly assembled Congress organizes. In the Senate, to be sure, not a great deal happens.

¹ Art. II, § 3. Cf. Art. I, § 5, cl. 4.

² Art. I, § 2, cl. 5, and § 3, cl. 4-5.

³ *United States v. Ballin*, 144 U. S. 1 (1892).

Because of overlapping terms, that body has a continuous existence and has never been without organization since it started work in 1789. At the opening of a new Congress, there is accordingly no occasion for organizing the Senate from the ground up; all that is necessary is to swear in the new members, fill vacant offices (if any), and revise the committee lists in accordance with changes in personnel and in the number of seats held by the different parties.

What happens when a new Congress meets.

1. In the Senate

The situation in the House is quite otherwise. All of the members of that body go out of office at the same time, and with them disappear all officers, all committees, and even all rules; when a new Congress convenes, the House is merely a group of unorganized members-elect. Some one must, of course, take responsibility for getting action started, and by long-established usage (now embodied in statute) this duty falls to the person who has been clerk of the preceding House. Taking the chair, he calls the assembly to order and reads the roll of members-elect by states alphabetically, using a list made up from certificates of election placed in his hands by the proper state officials. If it appears that any seat is claimed by a person other than the one holding a certificate, the matter is referred for investigation and report (after the House has fully organized) to one of the three standing committees on elections. In the meantime, the person named in the certificate is presumed to have been duly elected, and he participates both in the organization of the House and in its regular work after organization until such time as it is determined that he is not entitled to a seat.

2. In the House of Representatives

(a) Reading of the roll

The roll having been read, the work of organization proceeds. As a rule, it is completed quickly—sometimes in a single sitting—although a close balance of political forces may precipitate a deadlock extending over days, and even weeks. The first important step is the election of a regular presiding officer, *i.e.*, the speaker, who forthwith takes the chair. After that, a clerk is chosen, and also a sergeant-at-arms, a doorkeeper, a postmaster, and a chaplain. While the constitution explicitly provides that all of these officials shall be elected by the House, what actually happens is that the House merely ratifies a slate previously agreed upon by a caucus of the majority members.¹ The speaker is voted for separately; the others usually as a group.² None of the officials named, not even the speaker, is required by law to be a member of the House; and, as a matter of fact, only the speaker ever is a member. Each appoints all of the subordinates connected with his office; and all are subject to removal by the House, although no speaker has ever been thus deprived of his post.

(b) Election of officers

The speaker-elect is escorted to the chair by the defeated candidate and sworn in, usually by the member of longest service. In turn, the speaker

(c) Taking the oath

¹ See p. 284 below.

² The death of a speaker during his term of service is usually followed by an election carried out without a contest, as when Speaker William B. Bankhead was chosen in 1936 and Speaker Sam Rayburn in 1940.

administers the oath to the members as a body, except those whose qualifications have been challenged; such persons are obliged to stand aside, and the oath is not administered to them until their right to membership has been established. Having once taken the oath, a member can be cut off from official connection with the House (in advance of the expiration of his term) only by death, by resignation, or by expulsion by a two-thirds vote of his fellow-members.

(d) Adoption of the rules

After officers have been elected and the oath administered, it is customary for one of the older members of the majority party to move the adoption of the rules of the House in the preceding Congress. If—as is usually the case—any members think that the rules ought to be amended, this is the time for them to try to get action; for, once the old rules have been readopted, they are almost certain to stand throughout the remainder of the session without significant amendment. The past quarter-century has witnessed several spirited attempts to introduce amendments at this stage, and a few have been successful.¹ Regardless of party, the older and more “regular” members—especially the leaders—commonly prefer, however, to keep intact the procedures under which they perchance have risen to power; most new members are too inexperienced to have strong opinions one way or the other; and insurgent groups bent upon change usually lack the votes necessary to attain their purpose. The old rules having been readopted, all further proposals for change are automatically referred to the committee on rules—a body regularly dominated by tried leaders of what is commonly called the House “machine,” and even more hostile to innovation than the general run of members. Any suggested departure which in any way threatens the continued control of these men in House affairs is likely to be smothered promptly by the committee and never heard of again, at least until the next Congress organizes.

How the rules have developed

The sources from which the rules, as they stand today, have been drawn are: (1) the constitution, in so far as a very limited number of its provisions are pertinent; (2) the *Manual of Parliamentary Practice* prepared by Thomas Jefferson for the use of the Senate when he was its presiding officer;² (3) the regulations adopted by the House itself from the beginning of its existence, and in early days based largely on the practice of the colonial legislatures and of the British House of Commons; and (4) the decisions of successive speakers and chairmen of the committee of the whole—decisions which bear much the same relation to the rules

¹ Notably at the opening of the Sixty-eighth Congress in December, 1923; the Seventieth, in December, 1927; the Seventy-second, in December, 1931; and the Seventy-fourth, in January, 1935.

² Jefferson's *Manual* is printed in 70th Cong., 2nd Sess., House Doc. No. 629, and in various editions of the *House Manual and Digest* and the *Senate Manual*. In 1937, the provisions of the *Manual* were adopted *en bloc* as governing House procedure “in all cases to which they are applicable, and in which they are not inconsistent with the standing rules and orders of the House.”

that court decisions bear to statutes. Originally, the rules were few and easily learned; today, the formal regulations alone (quite apart from the *Manual*, and also leaving out of account the exceedingly numerous decisions of speakers and chairmen¹) number forty-three, fill upwards of two hundred printed pages, and form "perhaps the most finely adjusted, scientifically balanced, and highly technical rules of any parliamentary body in the world"—certainly a code so elaborate and complicated that few members ever succeed in mastering it completely.² Steeped in House regulations and general parliamentary law as he is, and must be, the speaker requires the assistance of a parliamentarian and an assistant parliamentarian, both prepared to advise when a difficult (it can no longer often be a wholly unprecedented) situation arises.

The growth of the rules has not, in the main, resulted from periodic revisions, or from wholesale additions or renovations; such general overhauls have been few. Rather, it has come about chiefly by gradual adjustment and accretion—old rules being cautiously revised and perhaps eventually discarded, new ones occasionally finding places in the list. Most obvious and significant throughout has been the trend toward concentration of control over the time and business of the House in the hands of the leaders of the majority party—the speaker, the majority members of the rules committee, the chairmen of the other great committees, the "floor leader," the "steering committee"—with a corresponding narrowing of the opportunities left open to minority forces to interfere with carrying out the program of the majority, either by frontal attack in debate or by resort to obstructive or dilatory parliamentary tactics, known as filibustering.³

A final principal stage in the organization of a new House of Representatives is the election of committees—a procedure to be explained, however, when the committee system comes up presently for consideration.*

We accordingly are ready to turn to a closer view of the machinery with which a completely organized House carries on its work—chiefly, among

¹ Collected and edited by Asher C. Hinds (long a clerk at the speaker's table) under the title of *Parliamentary Precedents of the House of Representatives*, 5 vols. (Washington, 1907). In 1919, a supplement and index-digest, prepared by Clarence Cannon, House parliamentarian, was published; and in 1935 a new supplement, continuing Hinds, and entitled *Cannon's Precedents of the House of Representatives of the United States* (3 vols., numbered on the exterior VI, VII, and VIII).

² Among the matters dealt with are such fundamentals as the duties of officers; the number, nature, and kinds of committees; committee procedure and reports; the daily order of business; the "calendars"; priority of motions; questions of privilege; etc. Mr. Robert Luce, long a congressman from Massachusetts, and a prolific and scholarly writer on legislation, is authority for the statement that a simplification of the rules would enable "a session to be reduced in length one quarter, or a quarter more work could be turned out, and in either case the product would be better." *Legislative Procedure* (Boston, 1922), 19-20.

³ The rules of the House will be found in successive editions of the *House Manual and Digest*, which is always kept strictly up to date. A convenient guide to House procedure in all of its phases is *Cannon's Procedure in the House of Representatives* (3rd ed., Washington, 1939).

* See p. 278 below.

(a) Election of committees

the more formal agencies, the speaker and the committees;¹ and, among other instrumentalities unknown to constitution, statutes, and written rules alike, such surprisingly important adjuncts as the party caucus or conference, the majority steering committee, and the majority and minority floor leaders.

The Speaker of the House of Representatives

Powers
and
functions

The constitution touches upon the internal organization of the House only to the extent of requiring that there shall be a speaker; all the power and the prestige that this top-flight official has gained through the years have flowed, not from constitutional grants of authority, but from rules made by the House itself, and from usage and precedent applying and amplifying them. Notwithstanding a partial eclipse a generation ago when the right to appoint the standing committees was taken from him, the speaker is still the most commanding figure in the House and as such has many important things to do. He takes the chair at the hour appointed for a sitting of the House, sees that the journal of the preceding sitting is read, preserves order and decorum, and, in case of disturbance or disorderly conduct, causes the galleries or lobbies to be cleared. He "recognizes" members desiring the floor. He signs all acts, addresses, joint resolutions, writs, warrants, and subpoenas ordered by the House; interprets and applies the rules; decides questions of order, subject to appeal (rarely successful) by any member to the House itself; puts questions to a vote; and appoints such select and conference committees as from time to time are authorized. As a member of the House in full standing, he has the same right to speak and to vote that other

¹ These alone will be considered at some length, but a few facts may be noted concerning less important officers. (1) The clerk is responsible for keeping an accurate record of the proceedings of the House—in other words, the journal which the constitution requires to be kept and to be published from time to time (Art. I, § 5, cl. 3). Copies of the printed *Journal* are furnished to every member, and are also sent to designated officials in every state. The clerk issues, at the direction of the House, all writs, warrants, and subpoenas; he certifies to the passage of all bills and joint resolutions; he makes contracts for supplies or labor required by the House; he keeps and pays the stationery accounts of members, and pays the officers and employees of the House their monthly salaries. (2) The sergeant-at-arms is required to be present in the House during its sittings, and to assist, if need be, in maintaining decorum, under the direction of the speaker or chairman of the committee of the whole. If for any reason the office of clerk is vacant, the sergeant-at-arms makes up the temporary roll used at the organization of a new House. He also executes the commands of the House, by summoning absent members, serving subpoenas for witnesses, and in other ways; and it is from him that members obtain their salaries and mileage allowances, as provided by law. (3) The doorkeeper enforces the rules regulating admission to the floor and galleries of the House, and is required to file with the committee on accounts, at the beginning and end of each session of Congress, an inventory of all furniture, books, and other public property in the committee and other rooms under his charge. (4) The postmaster superintends the post-offices maintained in the Capitol and the House office-buildings for the accommodation of members and employees. (5) The chaplain is required to be present at the beginning of each day's sitting (unless he provides a substitute) and to open it with prayer. All of these offices, and the many subordinate positions attached to certain of them, fall to supporters of the dominant party in the House. See L. Rogers, "The Staffing of Congress," *Polit. Sci. Quar.*, LVI, 1-22 (Mar., 1941).

members have, although he cannot be required to vote except to break a tie, or when the House is voting by ballot. He may appoint any other member to serve as presiding officer in his place for a period not to exceed three days (in case of illness, ten days); and in practice he often calls upon other members to occupy the chair temporarily.¹ Chosen in the first instance by a caucus of the majority party members,² and thereupon formally elected by the House (usually in competition with a minority nominee), a speaker may ordinarily expect to be reelected at the beginning of each succeeding Congress as long as he remains a member and his party continues in control. If the party balance is overturned, the incoming majority is likely to elevate to the post the man who previously was minority floor leader.

Forty years ago, one would have put high in the list of powers enjoyed by the speaker that of appointing all regular (as well as special and conference) committees, including the most privileged and influential committee of all, namely, the committee on rules—of which, indeed, the speaker himself served as chairman. This power, however, added to all of the others, made of strong-willed speakers like James G. Blaine (1869-75), Thomas B. Reed (1889-91 and 1895-99), and Joseph G. Cannon (1903-10) virtual autocrats, without whose assent practically no legislation could be enacted, or even considered; and a House "revolution," engineered in its earlier stages by a coalition of insurgent Republicans and Democratic minority leaders, culminated, in 1910 (after one of the most spectacular parliamentary battles in the history of the House), in the removal of the speaker from the rules committee, and eventually, in 1911, in the transfer of the selection of all regular committees from him to the House itself.³ This was a hard blow, and the speakership has never since been quite the same. But plenty of important prerogatives remain—granting or refusing members the floor, declining to put motions regarded as dilatory, ruling members out of order, deciding vital questions of procedure—together with, as observed above, a certain amount of appointing power, and sometimes also important power of reference, i.e., the power to decide to what committee a public bill shall be referred, provided the clerk of the House (who normally makes the assignments in accordance with the nature of the bill) is in doubt. Power arises also from the freedom with which the American (in contrast with the English) speaker wields his authority as a party man and for party ends. All told, if the speaker no longer rules with the rod of a "Czar" Reed or a Cannon,

The
"revolution"
of
1910-11

¹ The foregoing and other regulations will be found in House Rule 1, §§ 1-7. The speaker spends less time presiding than might be supposed, the reason being that he does not occupy the chair when the House is sitting as committee of the whole; in most sessions, a good deal more than half of the time. See pp. 302-303 below.

² Indeed, the choice may actually have been made by agreement among rival candidates and their supporters before the caucus met, as in the case of Speaker Rainey's nomination in 1933. On sectionalism as a factor in the election of speakers, see *Amer. Polit. Sci. Rev.*, XXIX, 985-986 (Dec., 1935).

³ C. R. Atkinson, *The Committee on Rules and the Overthrow of Speaker Cannon* (New York, 1911).

he nevertheless is a force of the first magnitude in the actual work of legislation.¹

The
power of
recogni-
tion

Take, as a single illustration, the power of recognition. The only way in which any member can gain the ear of the House is by being formally "recognized," *i.e.*, given the floor, by the speaker; and this opens up considerable opportunity for that official to control the course of debate in such a manner as practically to determine the fate of any measure to which he cares to extend, or from which he prefers to withhold, his favor. To be sure, he is bound to follow the rules of the House; and the rules give fixed precedence to some committees or to their chairmen, and require some distribution of time between members favoring and those opposing a pending measure. But, with all due allowance for such limitations, the speaker still has a good deal of leeway for exercising his own discretion in granting the floor to members; and in this way he often has frustrated the introduction or consideration of motions to which he personally, or the party with which he was identified, was opposed.

A favorite expedient of members who want to obstruct the adoption of a measure, or to wear down opposition, is to offer motions designed solely to use up time. Confronted with a situation in which an obstreperous Democratic minority seemed likely to make legislation practically impossible, Speaker Reed, in 1890, hit upon the plan of refusing to entertain motions which he regarded as dilatory; and before the end of the year the House, agreeing with him that "the object of a parliamentary body is action, not the stoppage of action," embodied the new policy in a formal rule which is still in force.² Such a rule cannot prevent members from slowing up business by exercising their constitutional right to demand the yeas and nays, even though the purpose be plainly dilatory.³ But the adoption of it by the House illustrates how the speaker not only may recognize or refuse to recognize, very much as he likes, in the daily course of proceedings, but may even influence the House to accept as fixed practice a principle or plan of recognition which he has himself devised.

Though often enough swayed by partisan considerations in earlier centuries, the speaker of the British House of Commons—prototype of

¹ Along with the president of the Senate and the majority floor leaders of the two houses, he is often called to the White House to discuss legislative programs and strategy with the chief executive. Indeed, he is always a main figure in the Monday morning conference utilized for years by President Franklin D. Roosevelt (see pp. 381-382 below).

² House Rule XVI, §10. Another familiar obstructive device of minority groups in earlier times was to leave the House short of a quorum by refusing to answer to a roll-call designed to determine whether a quorum was present, or by not participating when a vote was being taken. In 1890, when the Democratic minority threatened to make legislation impossible by resorting to these tactics, Speaker Reed, with characteristic forthrightness, overcame the difficulty of the "disappearing quorum" by instructing the clerks to count as present all members physically present, whether they answered to their names or not; and this procedure also found a permanent place in the rules (House Rule XV, § 3).

³ Art. I, § 5, cl. 3.

parliamentary speakers throughout the English-speaking world—long ago became a wholly disinterested and impartial moderator, unidentified with any party organization or movement inside or outside of the body over which he presides. He attends no party gatherings, contributes to no party funds, makes no campaign for reelection in his constituency, refrains from so much as setting foot in a political club.¹ The American speakership, both in Congress and in the state legislatures, has developed on very different lines. It is, and has been almost from the beginning, frankly partisan. ("I believe it to be the duty of the speaker," declared a past incumbent on taking the chair, "standing squarely on the platform of his party, to assist in so far as he properly can the enactment of legislation in accordance with the declared principles and policies of his party, and by the same token to resist the enactment of legislation in violation thereof.") This very well expresses the prevailing view. To be sure, the speaker must not be swerved by party considerations from faithful enforcement of the rules of the House. If he is wise, he will strive to be fair in his treatment of the opposition. He may even win encomiums from his political opponents—as did Mr. Longworth—for protecting their interests and rights. But, wholly unlike his British counterpart, he is actively and openly identified with his party's organization in the House—an indispensable cog in the majority machine. In the days of Reed and Cannon, he was a party figure second only to the president himself; even yet, he must usually be accorded front rank not merely in legislative influence, but in politics as well.

With few exceptions, the speakers of the House have been men not only of well-tested ability, industry, and tact, but also of sufficient aptitude for leadership to have brought them to the fore in their respective parties even before their elevation to the speakership; in proof of which one needs only to glance at the long list of persons who have held the office and observe the names of Henry Clay, James K. Polk, Robert C. Winthrop, Schuyler Colfax, James G. Blaine, Samuel J. Randall, John G. Carlisle, Thomas B. Reed, Joseph G. Cannon, Champ Clark, and John N. Garner. Despite, however, the high political importance attaching to the position in times past, only one speaker (Polk) ever reached the presidency, although Blaine missed it narrowly. This circumstance has not been altogether fortuitous; for whoever holds the speakership runs grave risk of arousing antagonisms within his party, as happened notably in the cases of Blaine, Reed, and Cannon; and this, of course, makes attainment of the presidency difficult or impossible.²

¹ On the English speakership, see F. A. Ogg, *English Government and Politics* (2nd ed.), 379-384, and especially M. MacDonagh, *The Speaker of the House* (London, 1914). Historically, the speaker was so termed because his main function was to "speak for" the House when petitioning the king.

² Nicholas Longworth, in *Cong. Record*, 69th Cong., 1st Sess., p. 382 (Dec. 7, 1925).

³ A sketch of the varying fortunes of the speakership between 1910 and 1927 will be found in P. D. Hasbrouck, *Party Government in the House of Representatives*, 1-25.

The speaker as a party man

Some well-known speakers

*The Committee System in the House of Representatives*Kinds of
commit-
tees

Legislative bodies the world over save time and otherwise promote efficiency by referring most matters that come before them to committees for examination and report; and nowhere is an extensive committee system more indispensable than in the American House of Representatives, confronted as it is every biennium with anywhere from ten to twenty thousand different legislative proposals, to say nothing of other items of business that come before it. In early days, each bill or other proposal was likely to be referred to a committee created for the particular purpose and passing out of existence when its task was completed; and "select," or "special," committees are still employed for studying designated subjects or sometimes investigating departments, services, or activities of the government.¹ Of a temporary nature also, although serving a different purpose, are conference committees, set up as needed to confer with similar committees of the Senate with a view to ironing out differences in the form and content of bills as separately passed by the two houses. As we shall see, too, the House very frequently resolves itself into committee of the whole for considering revenue, appropriation, and other important measures. Finally, early in the history of the House, standing committees made their appearance, and for a long time past all members have been assigned, at the opening of each Congress, to one or more of these. A few such committees represent only the House contingent on committees maintained jointly with the Senate, *e.g.*, on the library and on printing. But nearly all function within the House only, most of them serving as "miniature legislatures" to receive, examine, and presumably report upon measures of a given class or type referred to them during the two years of their existence, and in many cases also to take the initiative in framing and introducing bills.

The
standing
commit-
tees:Number
and size

At the opening of the nineteenth century, standing committees in the House numbered only half a dozen. As the volume and variety of work increased, however, they so multiplied that the surprising total of sixty-one was reached before a long-needed reform, in 1927, brought it down to forty-seven lately increased to forty-eight.² All of the committees that were lopped off had little or nothing to do, and even among the survivors, only about a dozen can be said to be of major importance, chiefly those on (1) ways and means—in charge of all revenue-raising measures; (2) appropriations—in charge, under present budgetary procedure, of all bills

¹ The best known (and most criticized) special committee of the House in recent times was the Committee to Investigate Un-American Activities, headed from 1938 to 1944 by Representative Martin Dies of Texas. See A. R. Ogden, *The Dies Committee* (Washington, D. C., 1944). At the opening of the Seventy-ninth Congress, in January, 1945, this committee, which had lapsed, was not only unexpectedly revived (with different personnel), but, by extraordinary decision, was transformed into a standing committee.

² Forty-six if the three committees on elections be viewed as, in effect, one committee organized in three branches. Lists of House committees, with the names of members, are printed in successive issues of the *Official Congressional Directory*.

appropriating money; (3) foreign affairs; (4) judiciary; (5) interstate and foreign commerce; (6) agriculture; (7) labor; (8) military affairs; (9) naval affairs; (10) merchant marine and fisheries; and (11) Indian affairs. In size, House committees range all the way from two members up to forty-three in the case of the committee on appropriations. Twenty-one is, however, the most common number. Members rarely serve on more than three standing committees; indeed, those who belong to major committees of the sort named above may serve on only one. Somewhat over a third of the more important committees meet regularly on certain days each week; the others meet, if at all, on call of their chairmen.

From the earliest days down to 1911, standing committees were appointed by the speaker, as select and conference committees still are. Since the date mentioned, the House itself has elected, even though what it actually does when a new Congress opens is merely to ratify lists of committee assignments prepared in advance by committees of selection set up by the respective party forces having claim to be represented. With only rare representation of third parties, the committees consist of Republican and Democratic members, in proportions fixed by the committee of selection of the majority party, but so as to reflect the relative number of seats possessed.¹ Thus in the Seventy-first Congress (1929-31), which was strongly Republican, the quotas (in the then typical committee of twenty-one) were fourteen Republicans and seven Democrats; while in the Seventy-third Congress (1933-35), in which the Democrats had an overwhelming House majority, there were sixteen Democrats and five Republicans.² Each party, of course, is free to determine for itself who of its members shall represent it on each of the committees. The committee of selection, or "committee on committees," which works out the Republican assignments is named by the party caucus, or conference, and consists of one member from each state having Republican representation in the House—each such member having, however, as many votes as there are Republican congressmen from his state.³ The Democrats, in caucus, first select their quota of members of the prospective ways and means committee, and then delegate to this group, as a committee of selection, the task of preparing the Democratic lists for all of the remain-

Method
of selec-
tion

¹ This bi-partisan basis of the committees is highly significant, in the first place because it enables all larger sections of the country to be represented at practically all times on all of the committees, and in the second place because it encourages the committees to look upon themselves as organs not so much of a party as of the House itself. In making assignments, a congressman's personal preferences are taken into account, although of course they cannot always be complied with. It is an important asset to any congressman to be a member of a committee having to do with matters, e.g., agriculture or interstate commerce, which are of large concern to his district.

² With 222 Democrats and 209 Republicans in the Congress (1943-45) as organized, the commonest ratio was twelve Democrats to nine Republicans. In the House in January, 1945, with 243 Democrats and 196 Republicans, from one to three additional seats or

³ Thus, in the Seventy-ninth Congress, the Democratic caucus, while the solitary member of

Committee
chairman-
ships
and the
seniority
rule

ing committees. With majority and minority lists (approved by the respective party caucuses) before it, the House rarely consumes much time in carrying out the formality of election.

Each committee is therefore composed of majority and minority members, with the majority always holding the chairmanship and (except in rare instances in which party lines break) completely in control, yet, significantly, with the minority usually in a position to obtain a hearing for its views. Whether or not the ablest member of a committee, the chairman is easily the most important. He it is who guides and directs deliberations, reports their results to the House, leads in debate on the measures reported, and not infrequently sees outstanding legislation sent down into history with his name attached, either alone (*e.g.*, the McKinley Act, the Sherman Anti-Trust Law, the Wagner Act, the Hatch Acts, etc.) or jointly with that of the chairman of the corresponding Senate committee (*e.g.*, the Esch-Cummins Act, the McDuffie-Tydings Act, the Smith-Connally Act, etc.). "At the commencement of each Congress," say the rules, "the House shall elect as chairman of each standing committee one of the members thereof";¹ and the formality of election is, to be sure, proceeded with when the committee slates are ratified. Except, however, on rare occasions when questions of party regularity are involved,² chairmanships are awarded on a basis of seniority; that is to say, the majority member of longest continuous service on a committee will as a matter of course be put up by the party nominating authority for the chairmanship.³ The same seniority principle applies to the ranking of all committee members: majority members are listed according to their periods of service, minority members likewise; and all move up on the respective lists as members nearer the top drop out, by death, failure to secure reelection, or possibly withdrawal in favor of more active service on other committees. A new congressman, therefore, regardless of how eminent or able he may be, has no chance at all to secure the chairmanship of a single committee, or usually even, a very high place in the committee rank and file. Indeed, he counts himself fortunate if he draws assignment to lowly positions on committees of secondary, rather than of third-rate, importance.⁴ Starting at the bottom of perhaps two or three committees, he will, of course—if his constituents send him back to Washington often enough—gradually make his way up

¹ Rule X.

² As, for example, in the case of the nominally Republican members who supported La Follette for the presidency in 1924.

³ The general practice is to continue members on the same committees from Congress to Congress; and this is wise, because many legislative projects of major importance carry over several sessions and require for their proper handling a familiarity with the details of subject-matter as well as prolonged acquaintance with the administrative personnel concerned. When the most of the committee chairmen are likely to be in office by unbroken Democratic

instances of new members winning notably that on foreign affairs.

toward a chairmanship. When finally he stands next to the chairman of a given committee in point of seniority, he is spoken of as the "ranking majority member"; and when the next vacancy occurs in the chairmanship, his claim will be held superior to that of any other member (providing his party is still in control of the House), even though he may be out of step with and *persona non grata* to the bulk of his party. Capture of the House by the opposing party will, of course, leave him high and dry, as simply ranking minority member, who, however, if party fortunes change soon enough, will yet step into the chairmanship. If worse calamity befalls and he drops out entirely for a term or two, he must start again at the bottom.

Manifestly disregarding substantially all qualifications except length of continuous congressional service, this method of allotting committee chairmanships has naturally come in for a good deal of criticism. In defense of it, however, three or four things can be said: (1) it largely averts the conflicts, intrigues, and delays that might be anticipated if chairmen were chosen every two years under a wide-open system; (2) it insures at least the highly desirable qualification of experience with and knowledge of the committee's field and function; (3) it enables a member to rise to a position of influence and power regardless of the size of his state or the dependability of his party "regularity"; and (4) while it yields occasional misfits, it has brought to the chairmanship of the greater committees numerous men of ability and distinction.¹

Of the numerous House committees, only one calls for special comment here, i.e., the highly privileged and peculiarly powerful committee on rules; certain others, e.g., the ways and means committee and the committee on appropriations, will receive attention at later points.² For upwards of a hundred years, the rules committee was merely a special committee set up at the opening of each Congress to offer the customary motion that the old rules be readopted, with such changes, if any, as the committee cared to propose. Even after it was added to the growing list of standing committees in 1880, its potentialities as an agency of unified and centralized control of House business were not immediately realized. In the next thirty years, however, successive rulings of the speaker and orders of the House invested it with prerogatives of little less than dictatorial character. Consisting, until 1910, of the speaker and two majority and two minority members appointed by him, it was, of course, dominated by the three majority representatives—actually by the speaker

The
commit-
tee on
rules

¹ For a fuller statement of the pros and cons of the question, see R. Young, *This Is Congress*, 108-114; and for a thoughtful defense of the seniority principle, J. K. Pollock, "The Seniority Rule in Congress," *No. Amer. Rev.*, CCXXII, 235-245 (Dec., 1925-Feb., 1926). The plan is followed in the Senate as in the House, and with the same advantages and disadvantages. An instance of its disadvantages, in Senate experience, was the elevation, in 1941, to the chairmanship of the committee on military affairs of a senator (Reynolds of North Carolina) who had opposed substantially every defense measure advocated by the Administration, supported by the bulk of his party, and adopted by broad bi-partisan vote.

² See pp. 488, 507 below.

himself; and it was this arrangement in particular that enabled the vigorous and picturesque Cannon to determine almost single-handedly what might and what might not be considered by the House and therefore to wield almost absolute control over all important legislation.¹ The speaker's removal from membership in the committee, the transfer of the selection of its members to agencies of party caucuses, and the increase of these members to ten, later to twelve, still later (1937) to fourteen,² left the speaker with perceptibly diminished power, but did not of themselves lessen the control of the committee over the legislative work of the House. As we shall see, that control has in later days been curtailed by the rise of such newer agencies of the majority caucus as the steering committee and the majority floor leader, and of such additional devices as the Monday morning White House conference³—with the result that, aside from the chairman, the members of the committee no longer rank, as they once did, among the dominant personalities of the House. Inasmuch, however, as the rules committee is the medium through which these guiding agencies achieve their objectives, the committee is still to be regarded as an instrumentality of considerable potency and importance.

How the
commit-
tee func-
tions

To begin with, once the general body of rules has been readopted at the opening of a Congress, all proposals for amendment are referred to the rules committee, which is likely to hold up action in any event, but certain to do so if the changes suggested would tend to impair control of business by the majority "machine." More important, however, is the committee's power to present to the House *special* rules or orders of its own devising, and aimed at fixing the order in which pending measures shall be considered, or limiting the time allowed for debate on a given matter, or indicating the sections of a bill that may and those that may not be amended, or stipulating the number and even the nature of permissible amendments, or in other ways vitally determining the conditions under which the work of the House in a given situation shall proceed;⁴ and usually the regimented House majority votes whatever the committee proposes. Specially privileged in obtaining the floor, the committee may at any time (except only when a conference committee's

¹ Since two of the majority members counterbalanced the two minority members, Mr. Cannon was accustomed to say that the committee on rules consisted of "myself and one assistant."

² Reduced again in January, 1945, to twelve (eight Democrats and four Republicans).

³ See pp. 381-382 below.

⁴ For example, the special rule under which the tax bill of 1943 was considered in the House limited general debate to two days, after which no amendments were to be in order except such as might be offered by direction of the ways and means committee, and such amendments being themselves not amendable. Even more drastic was a "gag" rule under which, in 1940, debate on a complicated and obtruse excess profits tax bill (no copy of which was available to congressmen until the day before the rule was adopted) was restricted to two hours. In extenuation, it was explained that no congressman could have understood the measure anyway!

report is being considered or the House has voted to go into committee of the whole), interrupt debate by introducing a special rule thrusting forward some entirely different bill or resolution irrespective of the regular order of procedure.¹ Insurgents now and then catch the majority managers napping, and succeed in getting a bill before the House contrary to the managers' intentions. But in such an emergency, the rules committee can always be hurriedly convened and a special order to meet the situation devised and reported, not only interrupting consideration of the insurgent measure, but indefinitely sidetracking it in favor of other business. Furthermore, the committee may itself draft a bill overnight, introduce it in the House the next afternoon, and force its passage the same day, without opportunity for so much as reference to a "subject" committee.² Small wonder that House minorities are all the time crying out against "gag rules"! Their only hope of relief, however, lies in transforming themselves into majorities—which, irrespective of party, can be depended upon, in their turn, to employ exactly the same tactics! Reliance on special rules as a means of expediting and controlling proceedings has in later years been growing steadily, and nowadays hardly any important legislation is enacted without the aid of them.³

The "Invisible Government" of the House

The speaker and other officers, the committees and their chairmen—even the powerful rules committee—are agencies of the House as such, designed to enable it to carry on business in an orderly and effective way. This formal machinery is, however, only part of the actual mechanism of House control. Superimposed upon it, interlocked with it, and sometimes surpassing it in actual power, is an "invisible government"⁴ developed and maintained on a party basis, and quite unknown to the rules—an extra-legal government consisting of the majority caucus

¹ Under Rule XI, ten other standing committees, including those on ways and means, appropriations, and enrolled bills, have leave "to report at any time"—subject, however, to slight qualifications such as those indicated in the case of the rules committee.

² The rules committee is itself, of course, a "procedural" committee.

³ During the memorable special session of 1933, called by President Franklin D. Roosevelt to deal with the economic crisis, special orders emanating from the rules committee governed the consideration of all important matters by the House except in the case of emergency banking and economy acts to which was applied a procedure so direct and quick that not even the rules committee had a chance to function. See *Amer. Polit. Sci. Rev.*, XXVIII, 70-83 (Feb., 1934), and cf., on an earlier period, *ibid.*, XXVI, 43-57 (Feb., 1930). In the first session of the Seventy-seventh Congress, opening January 3, 1941, the House broke all precedents in its use of special rules. Sixty-seven were introduced and voted on, all but three calling for immediate consideration of the measures to which they applied and limiting the time to be allowed for debate. Of the sixty-seven, fifty-eight were adopted. In the two succeeding sessions, the numbers of special rules introduced were forty-three (forty-one adopted) and forty-nine (forty adopted), respectively.

⁴ So designated because working largely behind the scenes, although plenty of its activities are quite as "visible" as those of the regular machinery provided for in the rules.

(Republican congressmen prefer the term "conference")¹ and certain instrumentalities through which the caucus operates, chiefly the steering committee, the majority floor leader, and the majority "whip" and his assistants. The minority has agencies of the kind, too, but of course not forming parts of the *government* of the House.

1. The majority caucus or conference

A caucus consists of the members of the House belonging to the majority or minority party as the case may be, and functioning either directly through privately held meetings or indirectly through agencies such as those mentioned above.² From the fact that nowadays both parties convoke their caucuses less frequently than formerly and leave decisions to be made more largely by a few leaders, it has been deduced that the caucus is no longer a significant factor in the legislative process; and certainly it is true, not only that the device has waxed and waned in importance through the years, but that of late—and especially with wartime legislation commonly cutting across party lines—direct caucus action has to a considerable extent faded out of the picture. The emphasis placed upon the point by some observers and writers is, however, exaggerated. In the first place, the caucus still functions actively in organizing a new House of Representatives (as well as in connection with organization in the Senate). It prepares the slate of officers (including the speaker) which a new House will unfailingly elect. Through the medium of its "committee on committees," it designates the majority members of all standing committees, subject, of course, to House election. It names the majority steering committee, floor leader, and whips. It considers whether changes in the rules of the House are desirable, and decides what ones, if any, to propose for adoption. On its part, the minority caucus similarly nominates officers, makes committee assignments, and sets up "invisible" machinery; and any significant changes of official or committee personnel required from time to time during a session will bring into action the caucus of the party concerned.

In the second place, the caucus may still be convoked—and occasionally is—to formulate plans for united party action on policies or measures before the House, especially if the party is plagued by division within its ranks. It may, and sometimes does, direct the majority members of important committees to see that committee reports are presented first to the majority caucus, and afterwards to the House only after caucus permission has been given. It may debate the details of bills and whip them into shape according to its own notions before the House receives the measures at all.³ It may influence, or even control, decisions upon what measures shall be pressed, what ones held back, what ones prevented

¹ The Democrats use this term also, but only to designate a caucus that does not seek to bind the participants to a given course of action. For purposes of simplicity, the traditional name "caucus" may, however, be adhered to in the present discussion.

² As will appear, the device is employed in the Senate also.

³ As did the Democratic caucus in connection with all of the principal measures of the first Wilson Administration.

from ever reaching debate.¹ These, to be sure, are points at which practice has varied widely, in different periods and as between different parties—so widely that no very useful generalizations concerning them can be framed. There have been times, *e.g.*, in the early years of the present century, when caucuses were held frequently, although for little purpose except to ratify decisions reached in advance by a handful of leaders; other times, notably after the “revolution” affecting the speakership in 1910-11, when meetings were not only frequent, but designed for actual discussion and decision; and still other times (like the present) when meetings have been infrequent, with the leaders acting independently, yet, after all, as agents, and presumably spokesmen, of the caucus silently standing behind them.

Two principal instrumentalities through which the majority caucus functions are the majority “steering committee” and the majority floor leader.² The steering committee consists of a varying number of leading majority members (of late, twenty-six, including seven serving *ex officio*), designated by the caucus, with due regard for geographical distribution, to represent it in exercising continuous supervision over the handling of business by the House.

2. The steering committee

Working more or less behind the scenes, it keeps the parliamentary situation in hand, whips faltering members into line, and in sundry effective ways sees that the will of the majority leaders—perchance of the caucus if it has expressed itself—is carried out.³ The committee's main business is (1) to select from the great mass of bills which encumber the House calendars those which the majority managers wish to advance to final consideration, and, after they have been decided upon, (2) to keep the tracks clear—with the powerful assistance of the committee on rules—for favorable action upon them. Naturally, its busiest moments are in the last crowded days of a session.

The majority floor leader, also chosen by the caucus, and acting under general direction of the steering committee, is almost equal in power to the speaker, from whom, indeed, he has inherited some of his prerogatives, and to whose office he may reasonably aspire to succeed.⁴ He keeps informed on the drift of opinion among the majority members, persuades and admonishes in the interest of party harmony, plans the course of debate, and indicates to the speaker what members are to be given the floor on particular measures, directs the activities of the whips, and confers with the minority floor leader (for the opposition has a floor leader

3. The majority floor leader

¹ Unless, by a procedure described below (p. 300), the House compels a committee to report out a given bill.

² A third is the party contingent in the rules committee; but we are here talking about only *party*, not *House*, machinery.

³ On the ground that it would constitute an undesirable limitation on his own powers, Speaker Garner in his day opposed having a majority steering committee, and in the Seventy-second Congress there was none. With Speaker Rainey in the chair, however, the regular practice was resumed in the next Congress.

⁴ As did Floor Leaders Burns in 1925, Rankin in 1936, and Rayburn in 1940.

too, usually its defeated candidate for the speakership) on the length to which debates shall be allowed to run and the times at which votes shall be taken. If one were asked to indicate the two individuals wielding most power in House affairs, he would not be far wrong in naming the speaker and the majority floor leader.

1. The
whips

The majority whip is named by the floor leader and subject to removal by him; and the whip may appoint any number of assistant whips—fifteen in present Democratic usage, so selected as to represent a similar number of geographical regions. A familiar duty of the whips is to see that the party members are at hand when significant votes are likely to be taken; but equally important is the canvassing of members to find out their attitudes on issues and policies, for the guidance of the floor leader and the speaker.

The
power of
the party
leader-
ship

From all this it is obvious that a person who views House organization and procedure merely through the medium of official machinery and formal rules will gain only a very imperfect understanding of how the work of Congress is actually performed. Speaker, rules committee, other committees, function—not as agencies or authorities apart—but as cogs in a larger machine which includes also the extra-legal party instrumentalities mentioned. Back of all else stands the majority caucus, whether continuously active and assertive or intermittently dormant; because even the speaker owes his position to caucus selection and is expected to lend himself loyally, in so far as the rules give him leeway, to seeing that opportunity is provided for decisions made by the caucus, directly or by its agents, to be carried out. Even in its greatest periods of activity, the caucus, of course, does not concern itself with everything coming before the House; no more do its agents such as the steering committee. There is no point to stirring party machinery to action on the many pieces of business on which party lines will not be drawn.¹ Furthermore, in their present mood, most congressmen prefer to be free agents, voting as they please rather than under caucus or other dictation; many indeed do not hesitate to identify themselves with bi-partisan blocs (*e.g.*, the farm bloc), to which they indeed may regard themselves as owing first allegiance. Recognizing this situation, the Republicans seldom attempt to bind their members even when a caucus is held and a line of action laid down; while the Democrats, although occasionally making a caucus action binding by two-thirds vote, nevertheless obligate no one on a question of constitutional construction or on a matter on which the member has received instructions from or made pledges to his constituents. Whether or not caucus action is involved, members of both parties are, however, in general *expected* to support the decisions reached by their accepted party leadership in the House, and

¹ In the first session of the Seventy-eighth Congress (January-December, 1943), only 101 of the 795 bills and resolutions passed by the House were regarded as "controversial," and only 68 of the 702 passed by the Senate. The proportions would be likely to be somewhat larger in peacetime.

habitual failure to do so¹ can usually be depended upon to have unpleasant consequences.

The System Criticized

Needless to say, the power of the caucus and its agencies, and the ways in which that power is employed, stir much discontent. The stifling of individual initiative, the penalizing of independence, the relentless use of the "steam roller," drive spirited members to insurgency and inspire attempts to build up *blocs* cutting across caucuses and party lines. The simple fact is that, although the effective functioning of such a body as the House of Representatives imperatively demands leadership, no provision whatsoever for congressional leadership is made in the constitution or the laws. Under parliamentary systems of government, such as the English, legislative leadership devolves naturally upon the cabinet. But our government is not of that sort. To be sure, the president supplies a good deal of leadership in larger matters; certainly such chief executives as Woodrow Wilson and Franklin D. Roosevelt have done so. The president, however, is at the White House, not on Capitol Hill, and such leadership as the House must have within its own ranks it has been obliged to develop for itself. This it has done according to no preconceived plan, but largely as the exigencies of party politics have determined. The results have been different in different periods. Once it was the speaker who dominated. Again (after the rules committee became elective) the speaker and that committee, sharing control. Still again, it was the majority caucus. Nowadays—as for a good while past—leadership is perhaps to be regarded as *ultimately* in the caucus, but in practice is to be found rather in the instrumentalities of that agency above mentioned, in conjunction with such regular instrumentalities of the House itself as the speaker, the rules committee, and the chairmen of the great standing committees—which, of course, means that leadership is considerably dispersed and not always easy to locate, although in any event gathered in the hands of an interlocking, majority, managerial directorate.¹ As matters have stood in the most recent years, it has been the speaker, the majority floor leader, and one or two other leaders who mainly have exercised the power of direction—under, however, so much pressure from the White House that they commonly have been regarded as more truly managers for the president than spokesmen of the House. In all periods, there has been dissatisfaction on the part of individuals and groups that have found themselves with less independence and power

The need
for leadership

¹ "The redistribution of power in Congress is in many respects similar to the game of button, button, who has the button? One knows that someone has the button, but it is at times difficult to tell precisely where it is. The responsibility for action lies in many hands and in many groups. As soon as you think you know where the responsibility lies, where the button is, it is slipped to someone else. The internal organization of Congress is so involved and so complicated that very few men, and they specialists in the legislative process, know who are the individuals and the groups concerned with any specific piece of legislation..." R. Young, *This Is Congress* (New York, 1943), 81-82.

than they believed they ought to have; revolt against "dictatorship" has followed revolt, only—speaking broadly—with the result, at best, of transferring supreme control from one point in the system to another.

Justifica-
tion for
the exist-
ing ar-
range-
ments

The present mechanisms of control do not, of course, lack apologists, and some of the arguments employed have a good deal of validity. There must, we are told, be not only routine rules and procedures, but people who will assert themselves as leaders, and means by which those who lead can get things done. To members whose policies and desires meet with frustration, such leaders will inevitably seem arbitrary and their methods harsh. But, once in power, these same members would bring into play a leadership of precisely the same character. The system as it stands must therefore be regarded as reflecting the general will of the membership. At all events, a dissatisfied majority can change it at any time. An arbitrary speaker can be overruled, or even deposed, by a majority vote. Any special order brought in by the rules committee can be thrown out in the same way. Either this committee or any other one can be compelled to report upon any matters referred to it. Majority or minority could, if it chose, decide to have no caucus, no steering committee, no floor leader. Therefore, runs the argument, since the full mechanism, in both its official and unofficial—its legal and its extra-legal or party-made—parts, goes on with little change from Congress to Congress, it must be regarded as fairly satisfactory to all save a few unreasonable members who are unable to adapt themselves to the ways of majorities.

But what
of major-
ity rule?

The argument is plausible, yet it does not quite cover the case. The difficulty is that, upon analysis, the alleged majority may very well turn out to be no majority at all. A speaker, for example, mounts the tribune because a majority of a party majority has agreed to vote for him. But such a majority may easily fall far short of being a majority of the whole House. Similarly, if polled individually, the bulk of the House membership might well be found to prefer quite a different grouping, and quite different chairmen, in the great committees. By the same token, measures approved in caucus and voted on the floor because members of the majority party, even though really opposed to them, feel obligated, either by caucus actions or by other pressures, to give them their support, may become law with the actual approval of what is numerically only a House minority. In other words, legislation tends to be only in form by House majority; in reality, it is often by mere *majority-caucus* majority.

Government by majority is, however, a tricky concept. We fondly suppose that we have it in this country, and at times we actually do so. Congressmen and senators, nevertheless, are often elected by mere pluralities; several of our presidents have had only a minority of the popular vote behind them; and decisions in Congress by something less than absolute majorities are merely part of an order of things which may be

faulty but is capable of being corrected only by procedures too drastic to stand much chance of being undertaken.¹

Organization of the Senate

Crossing over to the opposite end of the Capitol, one finds in the Senate both a formal organization and a superimposed mechanism of party instrumentalities broadly resembling those in the House, yet working quite differently at a number of points.² To begin with, the officers are much the same, except that the "president" of the Senate occupies a position decidedly unlike that of the speaker of the House. Being, by terms of the constitution, the vice-president of the United States, he is, of course, not chosen by the body over which he presides; hence, partisan and factional contests over filling the chair, such as have punctuated the parliamentary history of the House, have no place in the annals of the Senate—save as occasionally stirred by election of a president *pro tempore* to preside when the president is absent or when the office is vacant.³ Furthermore, the president of the Senate has no such control over legislative procedure as that which the speaker wields in the House; he may not even be a member of the party commanding a majority in the chamber. As a moderator, he maintains decorum, recognizes members, decides points of order, puts questions to a vote, and announces the results. His power of recognition is, however, exercised with less partisan motivation than in the House; and not only are his decisions on points of order subject to appeal by any senator, but especially difficult questions of order are as a rule referred for decision to the Senate itself. As a non-member, he never participates in debate and votes only when necessary to break a tie. Unless a person of unusual force, which he rarely has been, and also of high standing in the councils of his party, the figure ensconced in the Senate chair seldom seeks to exercise any sort of leadership or to influence the course of legislation.⁴

Officers:
the presi-
dent

¹ For currently assembled information on the machinery of the House and its workings, see articles by A. W. Macmahon, E. P. Herring, O. R. Altman, and F. M. Riddick, dealing with successive sessions and published yearly in the *American Political Science Review*. The *Official Congressional Directory* also is useful.

² The effect of the Senate's continuity upon its organization has been noted elsewhere. See p. 271 above.

³ Under a resolution of 1890, a president *pro tempore* serves until his successor is chosen. At the opening of the first session of the Seventy-second Congress (December, 1931), the Senate failed to elect. The incumbent, George H. Moses, therefore served throughout that Congress without reelection.

⁴ Vice-President Garner went directly from the speakership of the House to the presidency of the Senate in 1933, and although exerting a good deal of influence in a quiet and informal way, nevertheless accommodated himself successfully to the traditions of his new environment. Henry A. Wallace, when vice-president, was a prominent figure in wartime government circles, but the traditional sort of presiding officer in the Senate—except for the very unusual experience of breaking a tie vote no fewer than five times during his first eighteen months (on four occasions staying off defeat for the Administration). Harry S. Truman, stepped immediately from a senatorial seat to the presiding officer's chair (January, 1945), but in three months became president through the death of President Franklin D. Roosevelt.

Rules

Like the House, the Senate has a set of formally adopted rules, carrying over from session to session except as changes are made at rather lengthy intervals. For reasons already explained, they do not have to be adopted *in toto* at the beginning of each Congress; and, reflecting the smaller numbers, the more intimate traditions, and the special functions of the body, Senate rules are fewer, simpler, and more easily mastered than those of the House,¹ and rest more solidly upon Jefferson's *Manual*, which, after all, was prepared in the first instance for the Senate's use. In addition, as compared with the House rules, which lend themselves to autocratic majority control, the Senate rules are particularly fitted to protect the rights of minorities and to promote free discussion.² There is, of course, in the Senate also no lack of parliamentary precedents, forming the basis for a rich endowment of unwritten custom or usage.

Com-
mittees

Needless to say, there are committees—special and conference committees as in the House, and a score and a half of standing committees, many of them corresponding closely to, and bearing the same names as, committees in the other branch.³ Like the Senate itself, senatorial standing committees never die; new members are infused into them at every biennial reorganization, but the bulk of the membership always carries over from preceding Congresses. In 1921—six years before a similar step was taken at the other end of the Capitol—the list was pruned from seventy-four to thirty-four, and it has since been reduced to thirty-three, as compared with forty-eight in the House.⁴ Most important now are (1) the finance committee, which corresponds to the House committee on ways and means; (2) the committee on appropriations; (3) the committee on foreign relations, to which are referred all treaties and all presidential nominations to posts in the foreign service; (4) the judiciary committee, to which are referred nominations to judgeships and to other positions connected with the federal courts, as well as bills relating to judicial organization and procedure;⁵ (5) the committee on interstate commerce; (6) the committee on education and labor; (7) the committee on agriculture and fisheries, and (8-9) the committees on military and naval affairs. A number of the committees hold regular weekly meetings; the others meet on call of their chairmen. Senate committees range from three members to twenty-four in the case of appropriations; members are ranked according to seniority as at the other end of the Capitol; and

¹ Even so, when the late Dwight W. Morrow—an expert in unraveling intricacies in other fields—was senator from New Jersey, he sadly confessed that after six months of faithful attendance on the floor he still was often unable to fathom the parliamentary situation of the moment.

² The Senate's rules will be found in *Senate Manual, Containing the Standing Rules and Orders of the Senate, etc.*, 74th Cong., 2d Sess., Sen. Doc. No. 258 (1936), and later editions.

³ In 1930, the Senate discontinued use of the committee of the whole except in considering treaties.

⁴ The complete list, with the names of members, will be found in successive issues of the *Official Congressional Directory*.

⁵ D. G. Farrelly, "The Senate Judiciary Committee: Qualifications of Members," *Amer. Polit. Sci. Rev.*, 469-475 (June, 1943).

committee positions are divided between the two parties in about the same proportion as in the House, with all members serving on as many as five, and some on as many as eight or nine—which is too many, although less serious than might be imagined in view of the small amount of work which many of the committees find it necessary to perform.¹

The method of making up committee lists in the Senate is substantially the same as that prevailing in the House. At the opening of a new Congress, the leaders of each party appoint a "committee on committees" to distribute vacant positions among newcomers, to settle questions of seniority, and, in the case of the majority party, to name the various chairmen. When these party agencies have completed their work, the slates are reported back to the respective caucuses for approval and afterwards go to the Senate as lists of majority and minority nominees. Election on the floor of the Senate usually follows on a single ballot, without hesitation or discussion.

How
commit-
tees are
made up

At one time, the Senate committee system was criticized sharply, even among senators themselves, on the ground that the chairmen or ranking members of a few important committees were able to exert a disproportionate influence upon legislation because of the rule which required them to be appointed to the conference committees that adjust most of the differences arising over measures passing the two houses in dissimilar form. In 1919, this situation was remedied for the time being by a resolution of the then majority caucus forbidding any senator to be chairman of more than one of the ten most important committees or a member of more than two such committees.² The principle, however, was not embodied in a rule of the Senate as such and has not been adhered to by later party caucuses. In general, the seniority principle prevails in the Senate quite as inflexibly as in the House.

The Senate is, of course, no less susceptible to considerations of party than is the House, and special party instrumentalities—caucuses or conferences, steering committees, whips—are more or less in evidence. Like the machinery known to the rules, these extra-legal mechanisms work, however, under limitations imposed by the differing nature and traditions of the smaller body. The House is a highly integrated mechanism, with power concentrated in few hands. Perhaps its numbers and its tendency to mob psychology require it to be so. The Senate is a relatively small assemblage of older and more experienced men with higher regard for tradition, more assertive individuality, and less willingness to be herded and controlled. The presiding officer is, of course, in no position to dominate. The committee on rules is but a pale image of that in the House. Although choosing leaders and whips, and occasionally deciding upon a concerted course of action, a party caucus rarely amounts to more than

Party
instru-
mental-
ities

¹ Cf. pp 321-322 below.

² These committees are appropriations, agriculture, commerce, finance, foreign relations, interstate commerce, judiciary, military affairs, naval affairs, and post-offices and postroads.

a sort of informal council; insurgents or irregulars often refuse to go into caucus at all. In short, senators insist upon maintaining their own individuality and upon delegating control to no committee or other agency. Proceedings are leisurely, debate is practically unrestricted, coercive force is virtually unknown.

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CHAPTER XVI

CONGRESS AT WORK

The Capitol building in which Congress meets is a vast sandstone and marble structure situated on the brow of a low hill overlooking downtown Washington, the broad Potomac, and the heights of Virginia beyond. Since 1857, the House of Representatives has occupied a large rectangular hall in the south wing of the building; the Senate, transferred in 1859 from a room later used (though since vacated) by the Supreme Court, sits in a similar but smaller chamber in the north wing. As in legislative halls of Continental Europe, although not in England, the seats in each room are arranged in concentric rows, theater-fashion, facing the marble platform on which the presiding officer sits; and deep galleries provide space for six or eight hundred spectators—press, diplomatic, members' relatives, and general public. Formerly, the hall of the House of Representatives was fitted with separate desks for the members; and the Senate chamber is still so equipped. But the growth of numbers in the lower branch made it necessary, after the reapportionment of 1911, to remove the individual desks, leaving only the seats, in close proximity, as in a theater. Two large tables are, however, conveniently placed for the use of floor leaders and of committees whose reported bills are up for consideration—one on each side of the center aisle, near the aisle and well toward the front. At one of these, the majority members of the reporting committee take their station; at the other, the minority members. So far as practicable, Republican members of the House sit together on one side of the chamber and Democratic members on the other.¹ The seats of individual representatives are assigned, at the beginning of a session, by lot; although in point of fact they are not occupied regularly, and a member entering the hall while business is going on is likely to take any seat, not then in use, that happens to strike his fancy. In the Senate, where there is never a general vacating of places, a newcomer establishes his right to any seat not already belonging to a member, and as a rule occupies it regularly. The physical equipment of the legislative branch further includes numerous committee rooms in the Capitol building, an immense marble office-building for the members of the Senate, two such buildings for those of the House, a library in the Capitol, and the separately housed Library of Congress, which is the largest library not only in the United States but also in the world.

The
physical
setting

¹ In both cases, the Democrats to the right and the Republicans to the left of the presiding officer, although the arrangement (unlike the location of "right," "center," "left," and various intermediate shadings in European parliaments) has no political significance.

General
aspect of
congress-
ional
business

Although each branch of Congress is intrusted with certain tasks which the other does not share,¹ the two spend most of their time working at the same sort of thing, *i.e.*, considering bills and resolutions which, to become effective, must be passed in identical form at both ends of the Capitol.² Some of the measures on which they deliberate are designed to make or declare new law; others, merely to amend, clarify, or consolidate existing law; many do not make or modify law at all in any proper sense, but rather appropriate money, formulate rules, give directions, or even, in the case of concurrent resolutions, merely express attitudes or opinions. Speaking broadly, however, whenever matters are up which call for formal proposal, discussion, and decision in both of the houses, the same machinery is, or may be, employed, and likewise the same general scheme of procedure. Accordingly, a reasonably adequate understanding of how Congress carries on its work will be obtained if we briefly trace the steps that normally are taken between the time when a proposal of legislative nature is put into the form of a bill and the final publication of the measure (if it has emerged successfully) as a completed statute.³

Introduction, Authorship, and Number of Bills

How bills
are in-
troduced

Nothing is easier than to give a bill its start, *i.e.*, to "introduce" it. Whether a measure be "public," *i.e.*, of general application, or "special" (or "private"), *i.e.*, applying only to specified persons or places, all that is required is that a copy of it, endorsed with the name of the introducer, be laid on the clerk's (in the Senate, secretary's) table. Any bill may make its first appearance in either house, except only that bills for raising revenue are required by the constitution to "originate" in the House of Representatives.⁴ Indeed, through its right to amend revenue bills, even to the extent of substituting new ones, the Senate may, in effect, originate them also.⁵ Once introduced, a bill continues "alive" throughout the duration of the existing Congress or until sooner disposed of; in a succeeding Congress, however, it can get on a calendar only by being re-introduced.

Author-
ship

Nothing would be farther from the truth, however, than to suppose that some member of the House or Senate is the actual author of every measure presented. Congress, we are rightfully assured by a former member of long experience and high standing, is "not to any material extent

¹ For example, confirmation of appointments by the Senate and preparation of impeachment proceedings by the House.

² The two houses meet in joint session (in the chamber of the House of Representatives) only (1) to witness the count of the presidential electoral vote, (2) to receive oral messages from the president, and (3) to hold formal ceremonies such as state funerals or receptions for distinguished visitors, *e.g.*, in recent years, Prime Minister Churchill and Madame Chiang Kai-shek.

³ The somewhat specialized process of finance legislation necessarily falls within the scope of later chapters (xxiv-xxv) discussing national revenues and expenditures, and accordingly is treated at that point.

⁴ Art. I, § 7, cl. 1

⁵ See p. 309, note 2, below.

an originating body.”¹ In the first place, a large proportion of all major public bills introduced emanate—sometimes in fully drafted form—from the executive branch of the government, *i.e.*, from the White House or from one of the executive departments or independent establishments. To be sure, contrary to the situation in countries having a cabinet system of government, no member of the executive branch can directly introduce a bill. This, however, imposes no serious impediment; a senator or representative, or a committee, can always be found to take care of the simple ceremony. In practice, Administration bills—indeed nearly all important public bills, whatever their origin—normally come to the house in which they make their first appearance through the medium of one of the standing committees, being introduced usually by the chairman; indeed, many measures, *e.g.*, revenue, appropriation, and currency bills, are actually worked out by majority members of the appropriate committee.

In the second place, numerous bills originate with persons, groups, or organizations entirely outside of government circles; and these are commonly presented by members individually. Here we come upon a main reason for the flood of bills that descends upon Congress at every session. Senators and congressmen themselves, sometimes sharing the great American illusion that the way to cure any ill is to “pass a law,” originate a certain number. But to a far greater extent they are merely the purveyors of proposals from the outside. Judging it worth while to please those with interests or “causes,” and at the same time to have their names in the newspapers (in their home districts, at all events) as the authors of bills, senators to some extent, but especially congressmen, are usually willing to introduce any number of measures, however ill-considered and fantastic, at the request of persistent lobbyists or constituents with “a grievance, an ambition, or a hope.” They need not approve, or even understand, everything they introduce; hundreds of bills every session bear “by request” labels, which may usually be taken to indicate that the members formally presenting them disclaim any personal responsibility for them. Not a whit less on that account, such bills—the bulk of them private, or special, rather than public, and nearly all contemplating the spending of money—inundate the clerk’s table and help clutter up the calendars.²

The number of bills and resolutions introduced at every session is,

¹ R. Luce, *Congress—An Explanation*, 3.

² Administration bills are almost invariably drafted by experts in the departments (with more or less consultation with the chairmen or other members of the appropriate committees), and bills originating with private individuals or interests will often have been put into shape, by hired counsel or otherwise, before being intrusted to a member. Senators and representatives—whether as individuals or as committees—desiring assistance in preparing measures can always get it from a service known officially as the Office of Legislative Counsel, carried on at the Library of Congress since 1918 by a non-political chief draftsman and assistants who are officers of Congress, and employing some ten unheralded but extremely useful research and drafting experts (besides a few clerks), each specializing in a field such as taxation, banking, agriculture, or commerce. See F. P. Lee, “The Office of Legislative Counsel,”

Multi-
plicity

indeed; amazing. As many as 2,500 have been known to make their appearance in the House of Representatives alone on an opening day; and even counting pension bills only as grouped in omnibus measures, the total for recent Congresses has run from ten or twelve to upwards of fifteen thousand each—about two-thirds of the number, as a rule, being introduced first in the House and the remainder in the Senate.¹ Of the yearly grist, the best that one can say is that few of the measures presented contain possibilities of wise legislation, fewer still receive attention, and fortunately still fewer ever pass.²

Committee Stage in the House of Representatives

Refer-
ence to
com-
mittee

All bills introduced are referred to one or another of the standing committees.³ Private bills are turned over automatically to whatever committee—pensions, public lands, or what not—has been designated in each case by the sponsor. Public bills are sorted out and assigned, according to the subjects with which they deal, nominally by the speaker, actually as a rule by the clerk or one of his assistants. Sometimes, however—indeed, fairly often in these days of long and complicated laws—a bill is of such a nature that it might be referred with almost equal propriety to any one of two or more committees; and in this event, as indeed in all cases of doubt, and also in the case of all bills received from the Senate, the speaker is likely to decide personally what shall be done—perchance having regard for the composition of the committee almost as much as for the nature of the bill.⁴ Sometimes a bill, after being re-

Columbia Law Rev., XXIX, 381-403 (Apr., 1929). Cf. *State Government*, V, 6-9 (July, 1932).

Needless to say, the drafting of a bill of even comparatively limited scope is a difficult and delicate undertaking. Every detail of the proposal must be coordinated with the great mass of statute and case law already existing; words must be chosen with care so as to convey the meaning intended; powers and agencies of enforcement must be prescribed in full recognition that upon them will depend final attainment of the object sought; and always must be borne in mind the fact that the legislation, if of any actual importance, will meet opposition from the start and will almost certainly collapse unless drawn on such lines that the courts will sustain it. The Office of Legislative Counsel worked eighteen months on the draft of the tariff act of 1930. In addition to the Legislative Counsel, there is in the Library of Congress an undermanned Legislative Reference Service comparable to such services in many of the states, and aiding those members who know about it and really use it by collecting and placing at their disposal publications, compilations, and other informational materials. See J. P. Chamberlain, *Legislative Processes: National and State*, Chap. xiv. It may be of interest to note that the memorable Logan-Walter Bill of 1940, aimed at curbing the powers of the great regulatory commissions, and finally killed by presidential veto, was drafted by the American Bar Association's committee on administrative law. See pp. 415-416 below.

¹ During the second session of the Seventy-eighth Congress (January 10-December 19, 1944), 2,171 bills and resolutions were introduced in the House and 825 in the Senate. The House passed 953, the Senate 931.

² The output of the Seventy-eighth Congress (1943-45) was 1,157 acts (of which 508 were public and 589 private).

³ The procedure up to this point is on the principle that all bills are created free and equal. All start on the same footing. Once the race for enactment has begun, however, the vast majority are found to have been left at the post.

⁴ To avoid repetition, the legislative process will here be described with reference to the House, and only important differences of procedure in the Senate will be noted.

ferred to one committee, is recalled and sent to a different one; but under no circumstances may a measure be divided between two or more committees. The fate of a proposed piece of legislation may well be determined at this initial stage by the bill being referred to a committee likely to be friendly or, on the other hand, to one likely to be unsympathetic; and at this point the speaker may still wield the power of life or death. Authors or sponsors of a bill that is being held up in committee may maneuver to get it transferred to another committee likely to be more favorable. Thus, after being stified in the ways and means committee for several Congresses, an oleomargarine tax bill was, in 1902, finally turned over to the committee on agriculture, reported favorably, and duly passed. To achieve this end, it may even become necessary to rewrite the bill in part. After being stymied by refusal of the House labor committee and the Senate education and labor committee to report it out, the highly controversial Smith-Connally Anti-Strike Bill of 1943¹ was so recast as to enable it to be referred in the Senate to the judiciary committee and in the House to the committee on military affairs, both of which reported it favorably and thus cleared the way for its eventual passage. Reassignment can be forced upon an unwilling speaker only by a majority vote of the House; and committees from whose custody it is proposed to remove a bill can usually be counted upon to resist—as the two labor committees did (ineffectually) in the case of the Smith-Connally Bill. Obviously, if bills were to be tossed about freely among committees, much confusion would result; and in practice reassignments are rare. In any case a bill, after being referred, is printed, given a number, and distributed to all House members.²

Each of the important standing committees has a commodious room in the Capitol or in one of the office-buildings, with books, pamphlets, records, and whatever stenographic service is needed. The two houses are commonly in session in the afternoon; hence, committees regularly meet in the forenoon, and no committee of the House, save that on rules, may, without special permission, hold meetings while the House itself is sitting. Many committees have little or nothing to do. But some receive scores, and even hundreds, of bills every session, or have unusually long and complicated measures to handle (perchance, as in the case of finance bills, to write), and accordingly find themselves crowded for time. To expedite matters, these create sub-committees (usually of five members) to which particular measures or classes of measures are assigned, or even individual sections of the same measure if it be one of exceptional complexity and importance. At all events, it is in the committees, and more or less behind the scenes, that much of the actual record of Congress—especially in the case of the House of Representatives—is written.

Com-
mittees
at work

¹ See p. 617 below.

² Sections of presidential messages recommending legislation are similarly referred to the appropriate committees.

"Congress in its committee rooms," declared Woodrow Wilson, "is Congress at work."¹

Sources
of infor-
mation

On receiving a bill, a committee has first to inform itself on the measure's nature and contents, and then to decide what to do with it. For the great majority of bills, this means nothing more than a cursory glance, revealing that the proposal has no claim to attention, and forthwith condemning it to a lingering death in the committee files. A bill here and there, however, will interest the committee, or at all events the chairman, and, if time permits, will receive consideration. In the case of such a measure, the first requisite is information from which to judge whether legislation on the subject is needed, whether the present bill is calculated to meet the need, and what results and implications will follow if the bill is passed. The committee—at least some of its more experienced members—may already know a good deal about the subject. But usually more will have to be learned. Availing themselves of the resources of the committee library, the Library of Congress (including legislative reference service), and official files, the committee members may study the measure at first hand, and in due time come to a conclusion as to what action to take. Or the bill (or certain parts of it) may be studied more intensively by one or more sub-committees. Either by request or on their own initiative, too, interested officials may appear in person to give testimony and present argument; heads of departments, indeed, have been doing this increasingly in later years.

Enough has been said, however, about the ways in which bills originate to suggest that most measures of large importance—certainly most Administration measures—reach Congress only after extensive investigations of the subjects dealt with have been made. Congress itself, or one of the houses, may have sponsored such an inquiry, by either a standing or a special (sometimes a joint) committee. Again, Congress may have caused an investigation to be made by the Department of Labor, the Interstate Commerce Commission, or some other department or establishment. Still again, Congress may have arranged for a study by a commission consisting of a given number of senators and representatives, together with persons drawn from the general public and selected by the president. Or, the president may himself have found funds or secured an appropriation with which to carry on an investigation through the medium of a commission appointed by himself, and with a view to proposing legislation based on the data brought to light. Thus, when, in 1934, President Franklin D. Roosevelt decided upon a national program of social insurance, he created an *ex officio* committee on economic security which, through a staff of experts, brought together most of the facts and recommendations on which the great federal Social Security Act of 1935 was grounded. Similarly, when in 1935 he turned his attention to a general reorganization of the executive branch of the national government, he

¹ *Congressional Government* (Boston, 1885), 79.

appointed a committee (of expert private citizens) on administrative management to conduct the studies on which alone a well-considered scheme could be based.¹ All materials assembled in such ways are, of course, placed at the disposal of the Senate and House committees through whose hands the resulting bills will pass; although naturally the committees may themselves gather such further or different information as they desire.

Finally, if a bill deals with a highly controversial subject, or will seriously affect large numbers of people, the committee having it in charge will almost certainly hold public hearings on it. That is to say, arrangements will be made for individuals or spokesmen of organizations having interests involved, or presumed to be in possession of useful information, to appear before the full committee or a sub-committee designated for the purpose and give testimony while the members listen and perhaps draw them out with questions. Certain persons are commonly invited to appear, but opportunity will usually be offered others who desire to do so, including paid attorneys engaged to support or oppose the measure, or specific clauses of it. On a great tariff bill, hearings—usually held by sub-committees visiting different sections of the country—may extend over many weeks, the stenographic reports running into thousands of pages of print.² Both House and Senate use the device increasingly, as also do most of the state legislatures; and although experimented with in one or two European countries (chiefly pre-Nazi Germany), it may be thought of as a characteristic feature of the American legislative process.

Notwithstanding varying amounts of publicity in the earlier stages of its deliberations, the committee eventually goes into executive session on a bill and reaches its conclusions in private.³ Any one of several results may follow. It may report the bill unchanged, which is, of course, tantamount to recommending its passage. Or it may strike out some sections, add others, or alter the phraseology, and report the measure in this amended form. Or it may frame a bill of its own and present it as a substitute. In all of these cases, the report is likely, although by no means

Public
hearings

Possible
courses
of com-
mittee
action

¹ See p. 475 below.

² On a similar scale have been hearings on other types of bills in recent years, e.g., the Senate judiciary committee's hearings of 1937 on the President's court reorganization bill (see p. 472 below). Extended hearings take place also in connection with congressional investigations, but in this instance the persons who appear are chiefly those whom the committee desires to question and summons for the purpose.

³ It is considered a breach of good faith for members to disclose what went on in the committee while in executive session, even though they may be sorely tempted to do so; and the votes taken in committee are never made a matter of public record. It is easy to condemn (as some have done) the secrecy surrounding committee deliberations. But there is another side to the matter. In the executive sessions of committees, writes an experienced member already quoted, falls "the most interesting, important, and useful part of the work of a congressman, and the part of which the public knows nothing. Indeed, the ignorance of the public about it is one of the causes of its usefulness. Behind closed doors nobody can talk to the galleries or the newspaper reporters. Buncombe is not worth while. Only sincerity counts." R. Luce, *Congress—An Explanation*, 12.

certain, to lead to favorable action by the House, especially if the committee (or even the majority element, in instances where party lines are drawn sharply) has come to its decision by a unanimous vote; and thus (to the dislike of some) legislation tends to be, in effect, by committee—by a *series* of separate committees—with the House acting only as a ratifying agency. The committee has, however, one other possible course: it may make no report at all—in other words, may “pigeonhole” the bill; and this, as we have seen, is the fate that befalls three-quarters or more of all measures introduced. The decision to make no report may come after, and as a result of, investigations and hearings; but in the great majority of instances it arises from agreement (tacit or otherwise) at the very beginning not to take up the bill at all.

Forcing
a com-
mittee to
report

“The ease with which a committee can kill a bill by simply not reporting it has always been a sore point, and controversy on the subject has filled many pages in the annals of the House. To be sure, committees are only agents of the House, and as such are subject to orders and instructions; if the House desires to discharge a committee from the further custody of a bill—in other words, require it to report—there is nothing to prevent it from doing so. The matter is, however, less simple than it sounds, because it is usually a minority, rather than a majority, that wants to get a bill out of a hostile or lethargic committee; and as the rules stand, there is no means by which anything less than a majority (218) can force a vote on a “discharge” question. In 1931, the House did adopt a rule under which as few as 145 members (one-third instead of one-half) could force such a vote in the case of any bill that had been in a committee's hands as long as thirty days; but on the ground that this gave too much scope to pressure groups and compelled the House to call back bills which only a minority wanted to have considered, the plan was abandoned in 1935.¹ Consequently, it remains true that almost any measure can be killed in its initial stages by simple failure of the committee having it in charge to report. Committees serve as agents of the House to investigate and make recommendations, and the House expects normally to be guided by their conclusions. Should they refuse to recommend action, that is ordinarily the end of the matter. Without, indeed, the rigorous sifting of bills accomplished in part in this way, the House would be hopelessly swamped with work, and it would become necessary to place severe restrictions upon the number of measures that members may introduce. Occasionally, a committee fails to report a meritorious bill for the simple reason that the majority members are personally or politically prejudiced against it. But most measures that come to their end because of failure to report deserve no better fate.”²

¹ The new rule was both introduced and repealed by a Democratic House, and repeal was in part motivated by the desire to make it less easy for the Republicans to force the consideration of measures incompatible with the New Deal program.

² In the three sessions of the Seventy-sixth Congress (1939-41), there were thirty-seven motions to discharge committees from the further consideration of particular

The Handling of Bills After Committee Stage

Having been returned to the clerk of the House, a reported bill is placed in one of three series, or lists, known as "calendars." If a revenue bill, a general appropriation bill, or a public bill directly or indirectly appropriating money or property, it goes on the Calendar of the Whole House on the State of the Union, commonly known as the Union Calendar; if a public bill not raising revenue or directly or indirectly appropriating money or property, it finds a place on the House Calendar; if a special bill, on the Calendar of the Committee of the Whole House, sometimes called the Private Calendar. Bills go on the respective calendars strictly in the order in which they are reported; and once there they remain for the period of a Congress (not merely a session) unless taken off.

The calendars

It must not be supposed, however, that bills are invariably called up from the calendars in the order in which they are listed—still less that all calendared bills are actually debated and voted on. With some two-score standing committees reporting bills, the calendars grow congested, and the best that the House can do is to pick off a bill here and one there for actual consideration, making sure that the most essential measures, *e.g.*, appropriation bills, are included, but letting the others take their chances. No House rule, indeed, is more frequently set aside than that which directs that bills shall be taken up in their calendared order; and no power of the majority steering committee is more important than that by virtue of which it decides when, and in behalf of what bills, the committee on rules shall bring in for adoption by majority vote a special rule or order making a given bill the regular business of the House forthwith or at whatever later time the order may specify, and attaching such time limitations on debate and restrictions upon amendments as the committee may choose. Most weightier measures—and some not so weighty—are thus lifted out of their sequence on the lists and put in a preferred position; otherwise, they would never be reached. Hundreds of measures "die on the calendars" in every Congress.

Selection of bills for consideration

There is, to be sure, a daily order of business, duly prescribed in the rules. But, as would be inferred from what has been said, this "regular" order is so frequently departed from as to have comparatively little

Regular order of business not adhered to closely

bills; but only two were agreed to, *i.e.*, accorded the necessary 218 votes; in the Seventy-seventh Congress (1941-43), of fifteen motions, only one was agreed to; and in the Seventy-eighth Congress (1943-45), of twenty-one motions, three were agreed to. The small quota of bills forced to the floor in this way has, however, included some measures of importance, *e.g.*, the Black-Connery "Wages and Hours" Bill in 1937 and the Geyer Anti-Poll Tax Bill in 1942 (see p. 172 above). For the illuminating history of a notable and finally successful effort in 1938 to bring the discharge rule to bear against the rules committee itself (on the Fair Labor Standards Bill), see *Amer. Polit. Sci. Rev.*, XXXII, 1102-1107 (Dec., 1938). On the discharge rule in general, see F. M. Riddick, *Congressional Procedure*, Chap. XIII. How bills are occasionally salvaged from committee cold storage by being transferred to different committees has been indicated above (see p. 297).

significance. In the first place, certain days are set aside for the consideration of (1) certain classes of measures, *e.g.*, the second and fourth Mondays of each month for District of Columbia business and the first and third Tuesdays for private bills, and (2) measures called up under special procedures, *e.g.*, on "Calendar Wednesday." Again, at any time after the journal has been read, it is in order to move that the House go into committee of the whole to consider revenue or general appropriation bills. Eleven standing committees, too, have the privilege of reporting at practically any time, and—more important—securing immediate consideration of their reports. Bills introduced at the instigation of the president or of a department head, or for any other reason viewed as Administration measures, are often given right of way. From the rules committee may come at any time proposals which will turn proceedings in an entirely different direction. Finally, on specified days, the House may, by two-thirds majority, suspend all rules and depart as widely as it likes from the regular procedure, even to the extent of passing a major bill through all of its stages at a single vote.¹ Under these circumstances, the process of legislation in the House has been likened to the running of trains on a single-track railroad. "The freight gives way to a local passenger train, which sidetracks for an express, which in turn sidetracks for the limited, while all usually keep out of the way of a relief train. Meanwhile, when a train having the right of way passes, the delayed ones begin to move until again obliged to sidetrack."²

Commit-
tees of
the
whole

Mention has been made of the committee of the whole; and inasmuch as the sessions of this committee occupy the greater part of the time of the House,³ something more should be said about it. In reality, there are two committees of the whole: (1) the Committee of the Whole House, which considers private bills, and (2) the more important Committee of the Whole House on the State of the Union, which handles public bills for raising revenue, for appropriating money, and indeed for most other purposes as well. Both are, of course, simply the House of Representatives

¹ Ordinarily, the two-thirds rule serves to protect the interests of the minority. It fails in this respect, however, when, as in the Sixty-seventh and the Seventy-fourth to Seventy-seventh Congresses (1921-23 and 1935-43, respectively) one party has so large a majority that the rules can be suspended by a vote of the members of that one party alone. An interesting example of summary legislation is afforded by an emergency banking bill introduced by Majority Floor Leader Byrnes on March 9, 1933, allowed forty minutes of debate, passed by the House without a record vote and before printed copies were available, passed by the Senate a few hours later, and promulgated by the President the same evening (see *Amer. Polit. Sci. Rev.*, XXVIII, 70, Feb., 1934). On suspension of the rules, see J. Q. Tilson, *Parliamentary Law and Procedure*, Chap. xii. As Mr. Tilson remarks (p. 107), some of the most important bills ever enacted into law by the American Congress have been passed under a motion to suspend the rules.

² D. S. Alexander, *History and Procedure of the House of Representatives*, 222.

³ "Under our rules today, ninety-five per cent of all the business that we transact is transacted in committee of the whole, and ninety-five per cent of the votes cast in this body are cast in committee of the whole. . . ." H. A. Cooper, in *Cong. Record*, 68th Cong., 1st Sess., p. 8. In 1930, the Senate discontinued the device except for the consideration of treaties; and, curiously, it is employed but little in our state legislatures.

sitting in a different guise. A member moves that the House resolve itself into committee of the whole for the consideration of a designated bill; the motion is put and passed; the speaker yields the chair to a special chairman whom he designates; one hundred members constitute a quorum, instead of the majority required when the House is in regular session; debate proceeds, very informally, under a rule allowing only five minutes to each speaker at a time, unless with unanimous consent; there are no time-consuming roll-calls, divisions being taken only *viva voce*, by a rising vote, or by tellers, with no record kept of how members vote; motions to refer or to postpone are not permitted; and when discussion is completed the committee votes to "rise," the speaker resumes the chair, the mace (the symbol of the speaker's authority) is restored to its place on a marble pedestal at the right of the chair, and the chairman of the committee reports the decisions reached. The House must, of course, act upon the committee's report in order to give it effect. This very useful device enables all finance, and most other important, bills to be considered for amendment under circumstances such that, as a rule, every member of the House who desires to do so can be heard; it permits great numbers of amendments to be presented, explained, and disposed of speedily; it facilitates rapid-fire, critical debate which commonly shows the House at its best; and the absence of recorded yeas and nays enables members to register their sentiments without check or restraint such as published votes sometimes impose.

A bill or joint resolution can be adopted only after three readings. Of these, the first is by title only; speaking strictly, it is no longer a "reading" at all, for the requirement is deemed to be met by printing the title in the *Congressional Record* and the *Journal*. Then the measure goes to committee and, if reported back, is placed upon its calendar for a second reading. The second reading—which (provided it is ever reached) takes place in committee of the whole, or for bills not there considered, in the House itself—is an actual reading in full, with opportunity for debate, and for amendments to be offered; and this is followed by a vote on the question, "Shall the bill be engrossed (i.e., formally copied by engrossing clerks) and read a third time?"¹ If the vote is affirmative, the bill goes back on its calendar and some time later the third reading takes place, by title only unless a member demands a reading in full. The vote now taken is on the measure's final passage; and if the result is favorable, the bill or resolution, duly signed by the speaker, is ready to be sent to the Senate, or, if that body has already enacted it in identical form, to the president.

The
three
readings

As a rule, debate takes place only on the question of ordering a bill to a third reading, although, if not cut off by the "previous question," it

Closure

¹The reading of bills by a reading clerk—long ago abandoned in the British Parliament and in several of our more progressive state legislatures—entails a serious waste of valuable time. Mr. Luce estimates that something like a month of every session is thrown away in mere "clerical enunciation." *Congress—An Explanation*, 27.

may be renewed on the question of final passage. When a measure reaches the stage at which it can be discussed on the floor, the chairman (or other designated representative) of the committee which has reported it favorably speaks in its behalf, being followed by a minority member of the committee if, as is usually the case, the report has not been unanimous. Other members of the committee speak alternately for and against the bill, and finally members of the House who do not belong to the committee are recognized—provided any time remains. And this matter of time presents problems. A rule dating from 1841 forbids a member to speak longer than one hour, except with unanimous consent.¹ This alone, however, would not keep debate within desirable bounds, and two additional, more drastic, devices are employed: (1) advance agreements between the opposing leaders—frequently embodied in special orders brought in by the rules committee—fixing the length of time that discussion shall be permitted to run, and perhaps indicating how the time shall be divided, and (2) a practice, borrowed in modified form from the British House of Commons, known as the "previous question." At any stage of discussion (except in committee of the whole), any member of the House may "move the previous question"; and if the motion carries, a quorum being present, debate is closed, no more amendments can be offered, and a vote is taken on whatever is pending. There is nothing to prevent a committee chairman or other supporter of a bill from offering such a motion immediately upon conclusion of the very first speech in favor of the measure. To prevent cutting off all debate in this way, however, the rules require the speaker to allow twenty minutes each to supporters and opponents before the vote is taken.

Checks
on ob-
struction

Formerly, opponents of bills under discussion employed all manner of expedients to kill time and prevent action. Dilatory motions were made; unnecessary roll-calls were forced; efforts were put forth to stop proceedings by leaving the House without a quorum; time-consuming amendments were offered; and as a result much time was wasted. Rulings of vigorous speakers,² duly incorporated into the standing regulations, have considerably reduced the effectiveness of such modes of obstruction, although ways of slowing up business (chiefly, demanding incessant roll-calls³) are still within the reach of members disposed to employ them.

Methods
of voting

Upon conclusion of the consideration of a bill or resolution, or an amendment thereto, a vote is taken. In regular sittings of the House, four, and in the committee of the whole three, modes of voting are used.

¹ A member in charge of a bill is allowed an additional hour to close the debate.

² Notably those of Speaker Reed in 1890, mentioned above (see p. 276, note 2).

³ With present facilities, the House has no way of protecting itself against waste of time in this manner. Under express constitutional provision, one-fifth of the members present can demand a yea and nay vote whenever they so desire (Art. I, § 5, cl. 3). A roll-call requires some thirty-five minutes, and in the session of 1935 it was estimated that the 203 roll-calls taken (either on demand for the yeas and nays or to determine the presence of a quorum) consumed approximately five of the thirty-three weeks the session lasted. A great deal of such time could be saved by the introduction of electrical voting.

The first, and most common, is a division by simple sound of voices, *i.e.*, a *viva voce* vote. If any member is dissatisfied with the announced result of this, he may demand a rising vote; whereupon the supporters of each side of the question are counted. Again, if one-fifth of a quorum demands it, a vote is taken by tellers: a teller is designated for each side; the two take their places in front of the speaker's desk; the members in favor of the measure pass between them and are counted, and then those opposed; and the result is declared by the tellers and announced by the chair. Or, finally (in the House as such, though never in committee of the whole), if one-fifth of those present demand it, the "yeas and nays" are ordered: the clerk calls the names of the members, who respond with "aye" or "no"; these individual votes—sometimes different (since they are to be put permanently on record) from those previously cast *viva voce*—are recorded; and the result is duly announced. The yeas and nays may be demanded before any one of the other methods has been employed, and, if ordered, are taken forthwith.¹ Effort used to be made to compel all members present to vote, but this has been given up as impracticable.²

✓ Procedure in the Senate—Filibustering and Closure

After a bill is passed in the House, it is certified by the clerk and carried by him to the Senate chamber. Procedure there, being in most respects like that in the House, need not be described in detail. Whether sent over from the other end of the Capitol or originating in the Senate itself, a bill is referred to one of the standing committees; if acted upon favorably, it is reported; if reported, it is placed on a calendar, from which it may be called up either in or out of its turn; three readings must be passed, the second one, at which amendments are offered, being the critical test; votes are taken substantially as in the lower house; and in the end the bill may be adopted as it stands, or adopted with amendments, or defeated.

There are, nevertheless, some important differences between Senate and House procedure. For one thing, whereas the Senate formerly made more use of the committee of the whole than does the House, it abandoned the device altogether in 1930 except only in dealing with treaties. In the second place, with the exception that appropriation bills enjoy a certain priority, there is virtually no privileged business in the Senate, leaving "the calendars to be followed almost automatically."³ More important still

Differences between Senate and House procedure

¹ When the question is one of passing a measure over a presidential veto, the constitution requires the yeas and nays to be taken and recorded. (Art. I, § 7, cl. 2).

² In 1941, the Columbia University Press announced the forthcoming publication of a stupendous work entitled *The Atlas of Congressional Roll-Calls; An Analysis of Yea-and-Nay Votes* (41 vols.), with maps showing the geographical distribution of the vote in every one of the 54,000 roll-calls in both branches of Congress from 1789 to 1932; and the first volume, in point of fact covering the years 1777-1789, appeared in 1944.

³ This is the more possible because of the small number of bills introduced in the Senate as compared with the House.

is the absence of any very effective arrangements for limiting debate. There are no restrictions on the length of speeches, except such as are occasionally agreed upon in advance with respect to a particular measure; nor any upon their number, except that a senator may not, without consent, speak more than twice on the same subject in a single day; and—save for (1) occasional resort to a “unanimous consent” procedure (under which the members agree to a specified restriction of debate), and (2) the very infrequent use of a closure rule adopted in 1917—debate proceeds with less restraint than in any other important legislative body in the world. The comparatively small number of members has made this possible; and it cannot be denied that such liberty has some genuine advantages. The knowledge that ordinarily debate will not be cut off as long as any member, majority or minority, has something to say encourages the consideration of measures from all angles. It operates, too, as a wholesome check, not only upon party autocracy, but sometimes upon tendencies to executive dictatorship as well. At all events, the Senate has been adamant in its refusal to adopt anything resembling the one-hour rule prevailing at the other end of the Capitol.

Obstruction
in the Sen-
ate: fili-
bustering

Unfortunately, liberty is sometimes abused. In the Senate, the commonest form of such abuse is boresome garrulity—wasting time by sheer talkativeness, as often as not on some subject entirely foreign to that supposed to be under discussion.¹ In the language of Jefferson's *Manual*, the rules still say: “No one is to speak impertinently, or beside the question, superfluously or tediously.”² But empty seats on the floor and yawning spectators in the galleries bear testimony to the fact that this rule—the latter part of it, at all events—is frequently ignored. More troublesome, however, is the practice of deliberately taking advantage of freedom of debate with a view, not to throwing light on the topic in hand or to converting the opposition, but to delaying and perhaps preventing action. This procedure, commonly termed filibustering, was by no means unknown in earlier times (there was an instance of it in the first session of the First Congress in 1789), but has been brought into play most spectacularly and successfully in the last sixty years, and especially since about 1910. A filibuster may be organized and conducted by a group or *bloc* of members, working in carefully arranged relays, or it may be carried on by a member singlehandedly; and it may have as its object to defeat a measure by “talking it to death,” to require it to be amended, or to compel the majority to agree to tack on some feature or to pass some other measure, perhaps quite unrelated, in which the filibusterers are interested. At best, valuable time is wasted; in addition, useful

¹ It has been remarked that in the Senate “a controversy may be raised about any question, and at any distance from that question”!

² *Rules and Manual of the United States Senate*, § XVII.

³ Sometimes, too, a Senate filibuster is employed to put pressure on the House of Representatives; as, for example, when, in 1936, a Senate group held up action on a postal appropriation bill, itself innocent enough, until the House had been coerced into drastic modification of a pending ship subsidy bill.

measures are sometimes defeated and needed appropriations held up. A favorite time to launch a filibuster used to be the closing weeks or days of a "short" session, since all that was necessary in order to achieve the purpose in hand was to hold out until an unalterable hour for adjournment of the session (noon of March 4) arrived. The Twentieth Amendment put an end to short sessions; yet senatorial filibustering is by no means a lost art.¹

The only restraint thus far imposed upon the practice took the form of a rule adopted in 1917, following defeat by filibuster of a bill for the arming of American merchant ships. The procedure prescribed is as follows.² First, a petition to close debate must be signed by one-sixth (sixteen) of the senators. On the second calendar day after this petition has been filed, the roll of senators is called on the question: "Is it the sense of the Senate that the debate shall be brought to a close?" If there is a two-thirds vote in the affirmative, the measure before the Senate becomes the "unfinished business," until disposed of, to the exclusion of all other business; and thereafter no senator is permitted to speak for more than one hour in all on the measure itself, on amendments to it, or on motions relating thereto. Furthermore, no amendments may be presented except by unanimous consent; no dilatory motions or amendments are in order; and all points of order are decided by the chair without debate.

The
closure
rule of
1917
2

This is closure in rather a mild form; the two-day delay provided for gives the opposition a chance to mobilize its forces, and two-thirds is a high figure for the supporters of the effort to attain. In the first nine years, the device was successfully invoked only twice, *i.e.*, in the debates on the Versailles Treaty in 1919 and on adherence to the World Court in 1926, and in the entire period 1917-44 only fourteen closure petitions were filed and only four were successful.³

Rare
use of
the de-
vice

When taking the chair as president of the Senate in 1925, Vice-President Charles G. Dawes lectured the members on the folly of trying to carry on their work under archaic rules that sometimes permit a single individual to defeat important legislation favored by an overwhelming majority;⁴ and when retiring four years later, he referred reproachfully

The prob-
lem still
unsolved

¹ In point of fact, Senator Huey Long carried on a memorable filibuster against the National Industrial Recovery Bill in the very first Congress after the Twentieth Amendment took effect. An anti-lynching bill was killed by a Southern filibuster in 1933, and in 1942-44, an anti-poll tax bill, duly passed in the House, was several times prevented from coming to a vote in the Senate by Southern filibuster or threat of such. See p. 172 above.

² *Senate Manual*, Rule XXII.

³ Efforts in 1942 and 1944 to invoke closure against the anti-poll-tax legislation filibusters were uniformly unsuccessful. Senators definitely favorable to the proposed legislation, when put to a test, drew back from forcing its opponents to stop talking. Very few of long service had not themselves engaged in filibustering at one time or another.

⁴ *Cong. Record*, 69th Cong., Spec. Sess. of Senate, Vol. LXVII, pp. 1-2. Cf. Democratic Majority Leader Barkley's castigation in 1938: "I agree that the rules of the Senate are the most archaic conglomeration of contradictory decisions that ever prevailed in any parliamentary or legislative body... I think the rules of the Senate

to the Senate as being, among modern deliberative bodies, the only one that has "parted with the power to allot its time to the consideration of subjects before it in accordance with their relative importance." Not even so vigorous a critic as Mr. Dawes, however, could stir much response either at Washington or throughout the country, and no early change of policy appears probable. The weight of argument, indeed, is by no means entirely on one side of the question. Quite to the contrary, senators and others who honestly believe the existing lack of restraint to be on the whole advantageous bring forward a number of contentions, all of considerable validity: (1) that under the rules as they stand, the Senate (as Mr. Dawes was obliged to concede) gets through with a very creditable amount of business—in five recent Congresses, for example, passing 182 more bills and resolutions than did the House;¹ (2) that the present oft-used device of "unanimous consent," by which the members agree in advance to limit speeches on a given measure after a certain day and to take a vote at a specified hour, serves all necessary purposes, being indeed itself a species of closure; (3) that by far the greater portion of the measures killed by filibuster are not favored by the country and are never revived; and (4) that the vigorous protests against filibustering sometimes voiced on the Senate floor come usually from members whose pet projects have suffered, but who, with circumstances reversed, would themselves stand quite ready to launch or participate in a filibustering effort. It is perhaps utopian to suggest that the best solution for the problem would lie in an extension of "senatorial courtesy"² to include a decent respect for the right of one's colleagues to vote on a legislative proposal.

Conference Committees

Resolving
differences
between
the
houses

A bill which passes both branches of Congress in identical form is sent to the president and becomes law if it receives his signature or is repassed by two-thirds majorities over a veto. The Senate may, however, amend a House bill, and the House may amend a Senate bill; and unless the first body forthwith accepts all of the amendments added by the second one, or the second one recedes from its position³ (neither of which will often happen in the case of an important measure), some means must be found of overcoming the disagreement. The device regularly employed to bring the houses into harmony is the appointment of "committees of

ought to be revamped. They ought to be modernized. They ought to be so changed as to make the Senate a self-governing body, which it is not now." "When a senator once takes the floor," admitted Democratic Floor Leader Robinson in 1932, "nobody but Almighty God can interrupt him—and the Lord never seems to take any notice of him."

¹ It is capable, too, of keeping debate on a high plane, as it did when considering the "Lend-Lease" Bill of 1941.

² See p. 353 below.

³ As in December, 1940, when, in order to rush the legislation through, the House voted to concur in the Senate's amendments to the pending Logan-Walter Bill aimed at curbing the powers of the regulatory commissions.

conference"; and statistics show that, on the average, from one-tenth to one-twelfth of all the bills and resolutions that Congress adopts—including almost all of the weightier ones, *e.g.*, on tariffs, taxation, commerce, currency, etc.—are referred to such mediating agencies.

A bill having been passed in two differing forms, either house may ask for a conference; and the request having been agreed to (very rarely is it refused), the presiding officer of each house names as a rule three or five, but occasionally, for very important bills, seven, or even nine, "managers" to represent it, including almost invariably in each case the chairman, the ranking majority member, and the ranking minority member of the committee having the bill in charge.¹ The House occasionally instructs its conferees on certain points, *e.g.*, not to yield on this or that particular provision; the Senate is less inclined to give instructions, yet now and then does so; and in so far as instructed, the managers can compromise only after going back to the body which they represent and obtaining permission. But as a rule the conference is "free"; that is to say, the managers are at liberty to discuss all features of the bill upon which there is disagreement and to exercise their own judgment in whipping it, by process of give and take, into a form which both houses will accept. They may not, however, change anything upon which the two houses have previously agreed.

Sometimes the task is easy and is performed in a few hours—for example, if it becomes a matter simply of splitting the difference between two sets of figures in appropriation or other finance bills. More often—especially if questions of basic policy are involved—it is difficult and entails days, or even weeks, of hard work.² If in the end it proves impossible, the bill fails, unless other conference committees are appointed and prove more successful. As a rule, a consensus is arrived at; and

¹ Normally this will send to the conference those members of the respective houses who have had chief responsibility for managing—perhaps also for framing—the measure to be discussed. Occasionally, however, a bill is so transformed at one end of the Capitol that the committee chairman and majority ranking member no longer approve of it and can hardly be expected to put up a spirited fight for it. Under these circumstances, they ought not to be appointed, or, if appointed, to accept service, as conferees. In 1935, Vice-President Garner announced that thenceforth he would appoint as Senate conferees only persons who would reflect majority Senate opinion. The number of conferees from the two houses on a given bill may differ; but this does not greatly matter since agreements are reached, not by majority vote of the group, but by concurring majorities of the two sets of conferees acting separately. Although objection has sometimes been raised to the presence of non-members, both Senate and House conferees frequently take along with them to conference outsiders who can give them expert information and advice.

² Scores, and even hundreds, of changes may have been introduced by the house which last considered the measure, and indeed the whole of the bill following the enacting clause may have been stricken out in favor of a new bill. Even in revenue legislation—despite the constitutional provision that all bills for raising revenue shall originate in the House—the Senate sometimes goes that far. Thus in 1883 the upper house struck out everything after the enacting clause of a tariff bill and wrote its own measure, which the House felt obliged to accept. It likewise added 847 amendments to the Payne-Aldrich Tariff Bill of 1909, dictated the schedules of the emergency tariff act of 1921, rewrote an extensive tax revision bill in the same year, and recast most of the permanent tariff bill of 1922.

the reported bill is always accepted or rejected by the houses without further attempt at amendment. Ordinarily, the house which has insisted on amendments recedes less from its position than the one which first passed the bill.

Defects
of con-
ference
commit-
tee pro-
cedure

As a device for oiling the machinery of legislation, committees of conference are, under American conditions, useful, if not indispensable.¹ Nevertheless, they have shortcomings. Without exception, they work behind closed doors, hold no hearings, and give their proceedings no publicity. Doubtless it would be difficult for them to make headway if they did otherwise. Nevertheless, in view of the power which they wield, strong objection can be, and is, raised. For, while the committees are supposed to deal only with actual differences between the houses and to stay well within the bounds set by the extreme positions which the houses have taken, they often work into measures, as reported, provisions of their own devising, even going so far as to rewrite whole sections with the sole purpose of incorporating the views which the majority members happen to hold. Log-rolling enters in, as in the work of the two houses separately; and sometimes the compromises reached embody rather the worst than the best features of the two contending plans.² Conference committee reports are likely to reach the houses near the close of a session; under the rules, they are highly privileged, especially in the House of Representatives; and while either house may disagree to a report and call for another conference, there is usually a strong presumption in favor of adoption. There may be little time for critical scrutiny or debate; and failure to act—especially if financial provisions are involved—might seriously interfere with the operation of the government. In practice, this often results in the adoption of important provisions, more or less surreptitiously added, without consideration by either house—in other words, legislation nominally by Congress but actually by conference committee. Any remedy found will probably take the form of reducing the need for using conference committees at all; and the principal suggestion to that end is that bills and resolutions be referred, not, as now, to separate committees of the two houses, but to joint committees, which not only would hold single sets of hearings, but might deliberate and report back bills to the two houses in such agreed form that further significant differences would not be likely to develop. Arrangements of

¹ They are the more necessary under our American system, because, in the first place, our national and state legislatures—unlike the British Parliament, for example—are organized on the principle of strict equality, legislatively, of the two houses, so that no bill or joint resolution can prevail unless agreed to in precisely the same form by both; and in the second place, because, whereas in cabinet-governed countries the ministers, who in a sense constitute a continuous conference committee of the two houses, are in a position to promote harmonious decisions, our system of divided government tends to leave the legislative branches isolated and devoid of coordinating machinery except such as the houses themselves create.

² There is the classic example of a tariff bill of several years ago in which the House imposed a duty of 25 cents a ton on coal, the Senate increased it to 50 cents, the House demanded a conference, and the conferees "compromised" on 75 cents!

this nature yield excellent results in the legislature of Massachusetts. But there are obstacles to adoption of the plan for Congress, not the least of them being a natural aversion of House members to joint committees in which senators seem likely to dominate; and, as indicated below, the outlook for the reform is problematical.¹

Some Further Aspects of Procedure

When a bill has been passed in identical form by both houses, it is "enrolled," *i.e.*, written or printed on parchment, and is thereupon signed by the presiding officers and sent to the president. If it is approved, or if it becomes law without presidential action, it is transmitted to the Department of State to be deposited in the archives, and also to be published. If it receives a "messaged" veto, it goes back to the house in which it originated and becomes law only if, upon reconsideration, it is passed in both houses by a two-thirds vote. If it is pocket-vetoed, it simply dies.²

A bill's
final
stages

On the ground that parts of its work, *e.g.*, the consideration of treaties, was of such a nature as to require secrecy, the Senate at first sat exclusively behind closed doors; indeed, even the House of Representatives occasionally barred the public. Strong objection, however, arose; and in 1793 the Senate adopted the wiser plan of opening its doors whenever engaged in ordinary legislative business and closing them only during "executive" sessions. The last closed session of the House was held not long afterwards, in 1811. On the theory that the Senate should be free to discuss treaties, presidential appointments, and sometimes other matters, without publicity being given to anything that was said, privacy for executive sessions was maintained for nearly a century and a half. Eventually, however, it broke down, partly because in later decades enterprising press correspondents found ways of ascertaining practically everything that was said and done in private session, but especially because of growing opinion, both in and out of the Senate, that, save under the most exceptional circumstances, the public is quite as much entitled to know the views expressed and the position taken by individual senators on appointments and treaties as on anything else. The matter was brought to a head in 1929 by unauthorized publication of senatorial votes on the hotly contested confirmation of a judge of the Court of Customs Appeals, and the outcome of an exciting debate was the adoption of a new rule under which all business previously handled behind closed doors (except treaties) was thenceforth to be considered in open session unless decided to the contrary. The House still has a rule permitting closing the doors for the purpose of receiving confidential

Publicity
of pro-
ceedings

¹ See p. 321. The principal work on conference committees and their procedure is A. C. McCown, *The Congressional Conference Committee* (New York, 1927).

An illuminating piece of reading on the matter dealt with in preceding pages is R. Young, *This Is Congress*, Chap. iv, "How Do Bills Ever Get Passed?"

² On the various forms of presidential veto, see pp. 375-376 below.

information from the president; and the Senate not only is likely to take similar action when important treaties are under consideration, but did so in June, 1942, when hearing the chairman of the naval affairs committee explain plans for new naval construction, and again in October, 1943, when listening to a detailed report by five members lately returned from a visit to areas abroad in which American armed forces were engaged.

Pub-
lished
records:

1. Pro-
ceedings

The constitution requires both houses to keep a journal and to publish it "from time to time."¹ The journals are, however, bare records of bills introduced, reports presented, and votes taken—that is, minutes of official actions, not records of debates. For a long time, debates in the House of Representatives were not reported, except in a haphazard way in some of the better newspapers; and Senate debates were practically not reported at all, although general accounts of what went on in that body were frequently printed, as were occasional speeches.² In 1833, the *Congressional Globe*, presenting the debates verbatim, was started as a private venture; and in 1873 its place was taken by the present *Congressional Record*, prepared by officers of Congress and printed by the government. Published daily during sessions, the *Record* purports to give an exact stenographic account of everything taking place on the floor of the two houses—save, of course, during closed sessions of the Senate. This, however, it does not actually do, partly because members sometimes edit their remarks in such a way as to make important changes in them, and also because, in the case of the House, speeches are frequently printed, under special leave, which were never delivered by word of mouth at all. The Senate does not permit the inclusion of undelivered speeches, but is quite as liberal as the House in allowing members to put into the *Record* correspondence, editorials, public documents, speeches of members on public occasions (even at party gatherings), magazine and newspaper articles, and selections from books, which have not been read in debate.³ These practices go far toward explaining why the *Record* has grown so voluminous as to be practically useless to non-members, except, of course, for historical or research purposes. Anywhere from twenty to thirty thousand of its generous triple-columned pages are filled every biennium—enough matter, such as it is, to make up a library of 150 ordinary volumes.

2. Stat-
utes

All acts and joint resolutions, when the process of enactment is completed, are transmitted to the Department of State and printed by it in

¹ Art. I, § 5, cl. 3.

² The collections entitled *Debates and Proceedings in Congress, 1789-1824* (42 vols., 1834-56)—commonly cited as *Annals of Congress*—and *Register of Debates in Congress* (14 vols., 1825-37) bring together these fugitive materials from newspaper, pamphlet, and other sources. There is, of course, nothing official about these publications, and the reports on which they are based are very incomplete and sometimes highly partisan.

³ A proposal from the floor of the House of Representatives in 1937 to restrict the pages of the *Record* to actual proceedings (at a saving of \$173,000 a year) met with a decidedly chilly reception.

the form of separate "slip-laws," which are commonly obtainable on application; and at the close of each session, the texts are collected, indexed, and published under the title of *Statutes at Large of the United States*—one volume containing all public acts and joint resolutions and a second devoted to private acts and resolutions, concurrent resolutions, treaties, and presidential proclamations.¹

Some General Handicaps Under Which Congress Works

Legislative bodies, the world over, have fared badly in our time. Under the blight of dictatorship and conquest, they were, over a period of twelve or fifteen years, all but extinguished in Continental Europe; and in countries where they remained intact they have been the object of bitter and despairing criticism. Amid the general bombardment, the Congress of the United States has not escaped. On the contrary, it has been (never more than during the recent war years) berated by editors, columnists, radio commentators, and professional reformers, in tireless chorus, as inefficient, irresponsible, obstructionist, extravagant, aimless, steeped in ignorance, and suffused with demagoguery.² If the indictment is well based, we are indeed in an unhappy plight; if Congress is half as bad as some people say it is, the heart has gone out of our American democracy and we are ourselves ready for some kind of dictatorship.

Congress
under
fire

Fortunately, however, such indiscriminate and reckless criticism is not sustained by the facts. To be sure—as every reader of the foregoing pages will have seen—Congress shows plenty of imperfections; and unquestionably it has declined in public esteem. But there is no reason to believe that the character and caliber of its members are any lower than fifty or a hundred years ago; many will risk political defeat rather than vote contrary to their convictions; and of corruption, in at least its grosser forms, there is little or none. Times have changed, and the ponderous oratory that once resounded through crowded halls has given way to less ornate discussion; but, as an eminent authority has remarked, the quality of serious speeches in both houses, considering the greater complexity of most of the problems that have to be dealt with, is still "amazingly high."³ Much of the complaint that one hears is merely abusive, personal, or partisan. Much of it springs from the disappointment or exasperation of people whose pet projects have come to grief (often deservedly), or whose notions of what ought to be done have not happened to coincide with those of the congressional majority. No Congress, however efficient, could hope to please everybody—nor, indeed, in all respects to please anybody. Do what they may, or do nothing at all, the

But not
as bad as
painted

¹ A complete compilation of the "general and permanent laws" will be found in *Code of the Laws of the United States* (4 vols., Washington, 1940), and its supplements covering the laws enacted in successive sessions. A useful general manual is L. F. Schmeckebier, *Government Publications and Their Use* (rev. ed., Washington, 1939).

² *Time*, *Fortune*, and the *New Republic* have been active purveyors of such opinion.

³ C. A. Beard in *Amer. Mercury* L.V 531 (Nov. 1940).

members are bound to encounter disapproval and complaint. The truth is that, notwithstanding frequent waste of time and misdirection of effort, a vast amount of careful and intelligent work is done on Capitol Hill, especially in the great committees, and that the houses somehow succeed in placing on the statute-book numerous measures representing honest attempts to promote the public well-being and backed by a great volume of favorable public sentiment. A stream does not rise higher than its source; by and large, Congress is no better, and no worse, than the people from which it springs.¹

A difficult rôle

The rôle assigned Congress under our system is no easy one, and handicaps are imposed, for some of which Congress is itself in no wise responsible. The size and regional diversity of the country multiply and complicate the tasks to be performed. So likewise do the federal system and the principle of separation of powers. Of similar tendency, too, is the increasingly technical aspect imparted to many subjects of present-day legislation by the achievements and applications of natural science. Handicaps arising from the lack of a regular and dependable leadership of the sort supplied in Great Britain and Canada by the cabinet have been noted above, along with the limitations inherent in either a leadership improvised by Congress itself or one imposed from outside by the president. Some further disadvantages under which Congress operates, however, remain to be noticed.²

Some handicaps.

1 Two-year term for congressmen

First may be mentioned the short term of members of the House of Representatives. When the constitution was framed, it was the fashion to argue that "where annual elections end, tyranny begins"; and the authors of *The Federalist* found it necessary to devote one of their papers to a defense of a term as lengthy as two years.³ Nowadays, many consider the term not too long, but too short. The average person elected to the House for the first time has no acquaintance with the prevailing methods of doing business, has had no legislative experience (except possibly in a state legislature or a city council), and has only a superficial knowledge of most matters with which Congress is called upon to deal. Elected for two years only, he cannot progress far toward becoming a useful member, much less a leader, before his mandate expires. Many

¹ On "What Congress Is Supposed To Do" and the difficulty of doing it, see R. Young, *This Is Congress* (New York, 1943), Chap. 1. Cf. C. A. Beard, "Congress Under Fire," *Yale Rev.*, XXII, 35-61 (Sept., 1932), and "In Defense of Congress," *Amer. Mercury*, LV, 529-535 (Nov., 1942); J. Voorhis, "Stop Kicking Congress Around!", *ibid.*, LVIII, 647-655 (June, 1944); H. S. Pritchett, "What's Wrong with Congress?", *Atlantic Mo.*, CLV, 288-294 (Mar., 1935); E. S. Bates, "Is Congress So Bad?", *Curr. Hist.*, XLIII, 595-600 (Mar., 1936).

² One former handicap, i.e., the biennial "lame-duck" session, has been removed (see p. 269 above). Never again will we have a situation like that existing in the dark winter of 1932-33 when a Congress containing 158 members who had been repudiated by the voters was functioning precariously under the discredited leadership of a defeated president, yet with a grave national crisis at hand.

³ No. LXX (Lodge's ed., 333-339). Under the original Revolutionary state constitutions, the members of the state legislatures were elected annually in every state except South Carolina, and there biennially.

congressmen, to be sure, are reelected at least once or twice, and are thus enabled to accumulate knowledge and experience. Indeed, a computation in 1929, based on the then existing Seventy-first Congress, showed that the average period of service of all members of the House at that time was 8.45 years. The figure was as high as this, however, only because of the exceptionally long stretches of service of certain members—thirty-five years, in one case—and the fact remains, not only that many members serve for only one or two terms, but that from one-seventh to one-third of the names on the roll of every newly elected House were never there before. Furthermore, a member cannot get far into a two-year term without being obliged to turn his thoughts to reelection, particularly if he comes from a “close” district. This distracts his attention and divides his energies. Still another practical disadvantage of the two-year term is that, while it provides a perhaps desirable opportunity midway during a president’s four years for a canvass and expression of popular opinion, in doing so it frequently brings the House of Representatives into the control of a party opposed to the president (as in the second Wilson administration and the Hoover administration), thereby tending to produce friction and paralyze action. A constitutional amendment fixing the term at four years has been introduced many times, but neither Congress nor the country has ever manifested much interest in the matter.

Another limitation arises from the insistence of our politicians and people that a congressman be a resident of the district which he represents; and this brings us to another interesting contrast between American and English usage. In England, a man aspiring to enter Parliament, but finding no opportunity in his own district, “stands” in some other district, wherever there is an opening and the party authorities will accept him as a candidate; or a member, defeated in the district which he has represented, tries his luck in another and, if successful, goes ahead with his career. There is nothing in the national constitution or laws to prevent a person from doing the same thing in the United States, save that he cannot, of course, become a candidate in any district outside of the state in which he lives; and there have been a few congressmen from New York and Chicago who dwelt in a section of the city not included in their respective districts. In general, however, if a man were to seek election in a district in which he did not live, he would make little headway against the voters’ assumption that only one of their own number can safely be trusted to look out for their interests. The results are sometimes unfortunate. Good men who happen to live in districts not dominated by their own party are cut off from any chance to serve the country in Congress; able members are forced to drop out simply because defeated in their home constituency; and the pernicious concept is fostered of the congressman as merely the district’s official agent—errand-boy, one is tempted to say—for procuring appointments, buildings, relief

• allotments, and anything else that can be got when the plum-tree is

2. Restriction to residents of district

shaken. For this unfortunate parochialism in our political practice there is, however, no apparent remedy.

3. Lack of public interest and of adequate reporting

This, indeed, suggests another unfavorable situation, *i.e.*, the lack of adequate popular understanding of, and interest in, the work that Congress does. Considering that the two houses every year enact hundreds of laws which operate throughout the entire United States and authorize the spending of mounting billions of the people's money, it might be expected that their proceedings from year to year, and almost from day to day, would command the thoughtful attention of the general mass of citizens. That they commonly fail to do so is not open to argument. Only when some unusual fight over the rules, or some sensational investigation, or a filibuster, or a particularly tense debate, is to be recorded, does the average small-town newspaper—on which most people are dependent for what they know about affairs at Washington—give much prominence (under normal peacetime conditions, at all events) to congressional proceedings; and even the metropolitan press no longer finds news value in congressional debates such as, in earlier days (particularly before the Civil War), were reported extensively, analytically, and with full appreciation of the public interests involved. To be sure, more of the work of Congress is nowadays done in committee rooms, and with less open and spectacular discussion. But it loses nothing in importance on that account; and if the press does not report it as it once did, the only reason is the apparent lack of popular demand. If, however, the people do not take a continuous, discriminating, and appreciative interest in what their representatives say and do at the national capital (as well as, of course, at state capitals and local seats of government), they have only themselves to blame if things go wrong.¹

4. "Pressure groups" and lobbying

There are, of course, those whose interest is unflagging. But to a regrettable extent they turn out to be men and women with an axe to grind—persons who want a constitutional amendment proposed or killed, a statute passed, defeated, or amended, a favorable or an unfavorable committee report made, an appropriation voted, or some other object served or benefit conferred; and another of the handicaps under which Congress works is the inescapable, and sometimes improper, pressure brought to bear by these "lobbyists."² It is to be noted that the lobby of

¹ On August 15, 1944, Senator Pepper of Florida introduced a joint resolution authorizing the broadcasting of congressional proceedings. 78th Cong., 2nd Sess., Sen. Joint Res. 145. The proposal has not met with much favor in Congress, and the public's response to such broadcasting would be problematical.

² Shading off into direct and systematic lobbying, yet more or less to be distinguished from it, are the incessant demands upon the congressman's time and attention from axe-grinding constituents who ply him with letters and telegrams and bombard him with requests for personal favors. Letters, former Vice-President Garner once observed, "are a congressman's bread and butter." The daily grist is appalling; and most of the writers are not simply sending friendly greetings—they want something, perchance information, a government document, settlement of a pension claim, a commission in the Army or Navy, an adjustment of income taxes, relief from a burdensome federal regulation, an appointment for a personal conference. And while many of the requests can be shunted off to some other government agency, the con-

which one so frequently hears in Washington—the “third house” of the paragraphers—consists not so much of persons seeking favors directly for themselves as of professional paid agents¹ of great interests or organizations, whose business it is to haunt the legislative halls and members’ offices² and work unceasingly for whatever objects their clients have in view; although a more refined technique, now increasingly employed, takes the form of prompting a congressman’s constituents to write or wire their representative in behalf of a given project or proposal. Especially active in these ways are the lobbyists of the American Legion, the Chamber of Commerce of the United States, the American Farm Bureau Federation, the National Grange, the American Association of Railway Executives, the A. F. of L. and the C.I.O., the Railroad Brotherhoods, the Joint Committee of National Utility Associations, the American Coal Distributors, the American Gas Association, the National Petroleum Association, the interests centered in the woollen, cotton, meat-packing, sugar, leather, steel, radio, motion picture, air transport, and other great industries, and even the National Federation of Federal Employees, the Federal Council of Churches, the National League of Women Voters, and the National Education Association.

Not all lobbying, be it noted, is reprehensible, either in object or in method. There are lobbyists for the most worthy causes as for the least worthy; and their work may be entirely open and above-board, and may have a wholesome educational effect, just as it may follow devious courses, by dubious means, toward mercenary, or even corrupt, ends. The fact remains, however, that the footsteps of every congressman are dogged by men—increasing numbers of women too—whose flattering attention is aimed exclusively at influencing him, by entreaty, promise, or threat, to vote for or against this or that particular bill, tariff schedule,

grassman with an eye on reelection, or merely conscientious about serving his constituents, will feel obliged to give personal attention to a heavy proportion of them. This is only one of the many ways in which a congressman’s time is so used up that little remains for studying matters of national importance. Senator Tydings of Maryland once reported that his typical day included sixty interviews, three hundred letters, one to five committee meetings, and a meeting of the Senate. As the logical link between the people back home and the vast impersonal bureaucracy of Washington, the congressman cannot, and should not, wholly escape the service function referred to. It has been suggested, however, that for his relief a congressional service bureau might be set up, manned with competent persons who could take care of a vast share of the queries and requests that daily clutter up every congressional desk. It would help greatly, too, if, in addition to the present essentially political secretary, each congressman were provided with a legislative secretary to assist him in investigating the contents and merits of the increasingly voluminous and technical bills that pile up on his desk.

¹ Many times ex-congressmen or ex-senators, presumed to know the right lines of approach.

² Also the offices of commissions, boards, department heads, and even that of the president; because, although lobbying is usually thought of only in connection with legislative bodies, a vast amount of the same sort of thing is directed toward other agencies of government as well. Obviously, it will not be necessary to lobby against a bill if an interested department can be persuaded not to have it introduced. Pressure-group activities in relation to parts of the government other than Congress are discussed at length in E. P. Herring, *Public Administration and the Public Interest* (New York, 1936).

subsidy, or privilege. During the recent war years, lobbyists for certain interests found little to do, but others were as active as ever, and new fields of effort were opened up. In preceding years of peace, upwards of two hundred organizations, industries, or other groups maintained a total of from eight hundred to a thousand liberally paid legislative agents permanently at the national capital, and twice as many more were similarly represented from time to time when measures affecting their interests were under consideration. Scarcely an important bill passed without complaint arising in some quarter that an importunate and lavishly paid "locust swarm" of lobbyists had had a hand in enacting it; and often as not the charge was fully justified.¹ Sometimes, indeed, the pressure group behind the lobby has been only one side of a triangle, with (a) a labor *bloc* or a farm *bloc* in Congress and (b) administrative agencies serving the same cause or interest constituting the other two; and thus a pressure-group economy or society may give rise to (changing the figure) "government by whirlpools of special interest groups," with the national interest completely lost to view.

The
problem
of regu-
lation

Twenty-two of the states have regulations on the subject of lobbying, usually amounting, however, only to a requirement that lobbyists be officially registered as such. At Washington, little control has as yet been introduced beyond requiring public utility lobbyists to register, and workers in behalf of foreign interests and of shipping interests both to register and to place on record the nature and objects of their activities. To be sure, the entire matter has several times been looked into by senatorial committees, notably in 1913 and 1935; and in 1928 and 1936 general measures defining lobbying and requiring all persons practicing it at the national capital to be registered, and to reveal by whom they were employed and to what end, were passed by the Senate, although rejected by the House. The light thrown by senatorial investigations upon the maze of influences and pressures amidst which Congress works has served to some extent as a corrective, and the publicity forced upon the particular groups of lobbyists mentioned earlier in this paragraph has helped. To the present time, however, legislation applicable to all lobbying alike has been obstructed by (1) honest doubt—inspired to some extent by the not too impressive experience of the states—as to how effective general measures of regulation would prove; (2) the difficulty of prohibiting improper practices without also interfering with legitimate ones; and (3) the fear of many congressmen that any law enacted might place

¹ A random illustration of the power of "pressure groups" in legislation is afforded by the measures of 1933-34 providing for Philippine independence. See G. L. Kirk, *Philippine Independence* (New York, 1936), Chaps. iv-v. The Hawley-Smoot tariff act of 1930 affords another good example. Occasionally, too, the "locust swarm" is really only an influential individual, as when the demagogue Father Coughlin compassed the defeat of the World Court Bill of 1935 almost singlehanded.

The power of the lobbyist would be sharply reduced if congressmen would but realize (1) that frequently he is engaged in promoting his own special interest rather than the interests of the people for whom he claims to speak and (2) that often as not lobbyists cannot deliver the votes they promise or threaten.

an obstacle in the path of lobbying activities in which they themselves might want to engage at some future time after going out of office.¹

The Problem of Congressional Self-Improvement

For most of the impediments thus far mentioned, Congress is not itself to blame; even lobbying (which of course has both its good and bad sides) could not be suppressed completely, even though restrictive regulations might usefully be applied. Congress labors also, however, under impediments of its own making, or at all events of such a nature that it could, by its own action, remove or alleviate them. And since there is no other way in which they could be removed or alleviated, it is gratifying not only that in the past few years there have been criticisms and suggestions from the outside, but that increasing numbers of earnest members, representing both parties, have discerned the need for the two houses to take their own reform in hand and prepare for more effective functioning in critical days ahead. During the two years covered by the Seventy-eighth Congress (1943-45), more than fifty proposals for specific reforms, or in some cases for more extensive action, were introduced in the two houses,² and in 1944 a joint resolution was adopted creating a bi-partisan committee composed of six members from each house and charged with making a full study of the organization and operation of Congress and with recommending plans "with a view toward strengthening Congress, simplifying its operations, improving its relationships with other branches of the United States Government, and enabling it to meet its responsibilities under the constitution." Although restrained from recommending any changes in the parliamentary rules governing proceedings in either house, this committee (which began holding hearings in January, 1945) may be expected to serve usefully as a spear-head of congressional reform, and its creation was an encouraging development.³

A few changes that might conceivably come out of honest effort of Congress to improve itself may be indicated. Possible changes

(1) To start with the most improbable, the membership of the House of Representatives, admittedly too large, might be reduced from the

¹ The most important treatise on the subject is E. P. Herring, *Group Representation Before Congress* (Baltimore, 1929), but a more recent and very informing one is S. Chase, *Democracy Under Pressure; Special Interests vs. the Public Welfare* (New York, 1945).

For additional references see p. 324 below. A large amount of interesting information will be found in *Lobby Investigation; Hearings Before Sub-Committee, 71st Cong., 2nd Sess., Pursuant to Sen. Res. 20* (Washington, 1930).

² The bulk of these are classified and discussed in J. A. Perkins, "Congressional Self-Improvement," *Amer. Polit. Sci. Rev.*, XXXVIII, 499-511 (June, 1944).

³ Influential in preparing the way for this move within Congress was a committee of the American Political Science Association which from 1942 met frequently with senators and representatives for discussion of the subject. For a full consideration of the problems involved, with recommendations, see *The Reorganization of Congress; A Report of the Committee on Congress of the American Political Science Association* (Washington, D. C., 1945). A somewhat similar, but more hastily prepared, publication is R. Heller, *Strengthening the Congress* (Washington, D. C., 1945), published under the sponsorship of the National Planning Association.

present 435 to the 300 most often suggested as being nearer the right figure. Such a change could, of course, be made in connection with any decennial reapportionment.

(2) The two houses might advantageously divest themselves of an immense amount of petty business that at present clogs their proceedings and uses up time better spent on more important matters. An illustration is the thousands of private bills, introduced in every Congress, most of them relating to claims of individuals against the United States. It would be a simple matter to transfer jurisdiction over such claims to the federal district courts, or in the case of lesser ones, to appropriate administrative agencies. A hundred enactments per Congress, too, relating to bridges and bridge-building could be obviated by adding the necessary authority over the subject to that already possessed by the War Department.¹ Strong recommendation, however, by President Roosevelt, in a special message of January 14, 1942, that reforms of these kinds be undertaken elicited no response.

(3) Incident to the congestion resulting from petty business, and to the czar-like control of procedure in the House by the "machine," is the drying up of debate. In the Senate, to be sure, there is genuine debate, which often extends to principles and not mere details and technicalities; and, with the aid of the five-minute rule, the House, when sitting as committee of the whole, carries on animated interchange of information, opinion, and argument. Except sometimes in the case of finance bills, the House, however, has practically ceased to debate large measures in a large way, through the medium of carefully prepared and exhaustive speeches; the great Labor Relations Act of 1935 received exactly three hours of general debate in the House, and the Wages-and-Hours Act of 1938 was debated and passed in a single day. The reason for such scantiness of debate is that the fate of most important bills is predetermined by decisions and acts of the majority leaders, with the aid of the majority caucus, or conference, and the rules committee. Bills reported from the standing committees are explained briefly by the committee chairman, and perhaps other majority members, in an agreed order, and spokesmen of the minority are allowed a chance to present their views. But, with rare exceptions, no one expects votes to be changed by the arguments of either side. The general run of members have not studied the measure; they assume that the committee majority (or minority, as the case may be) has gone into the matter and knows what it is talking about; even

¹ A surprising amount of time, also, is devoted to matters of a kind ordinarily falling within the jurisdiction of a city council, *i.e.*, the affairs of the District of Columbia. This, however, is by constitutional prescription and could not be altered by Congress, even if agreed to be desirable—except, perhaps, that Congress might give the District a form of government enabling it to take a larger share in handling its own affairs. See p. 713 below.

On the unimportant nature of much of the legislative business on which Congress spends time, see R. Luce, "Petty Business in Congress," *Amer. Polit. Sci. Rev.*, XXVI, 815-827 (Oct., 1932); C. A. Beard, "Squirt-Gun Politics," *Harper's Mag.*, CLXI, 147-153 (July, 1930).

if time is allowed, they hesitate to involve themselves in a discussion in which they might be worsted, and still more to incur suspicion of party irregularity or disloyalty. Accordingly, they usually vote almost automatically to uphold their fellow-partisans on the committee, in pursuance of the general program mapped out by the party leaders. In the case of major legislation, it is, however, highly desirable that members be able to familiarize themselves, through full debate, with what they are voting on; and equally serious is the consideration that it is only through prolonged debate of a measure that the country can come to understand it and Congress receive back some indication of public opinion concerning it. More provision for general debate in the House needs, therefore, to be made

(4) Hardly any one, in Congress or out, discusses congressional improvement without stressing the need for a drastic overhauling of the committee system. Many of the existing eighty-one standing committees (in the two houses) are unnecessary; the two to three hundred sub-committees are likewise excessively numerous; members often can attend meetings only rarely and in any event serve only perfunctorily; economy of time and effort through larger use of joint committees of the two houses has never been fully explored. Recognizing these shortcomings, representatives and senators have come forward—in resolutions, speeches, interviews, and articles—with proposals for “streamlining” the committee structure in one or more of the following ways: (1) reduction of the number of standing committees by half, or even more;¹ assignment of senators ordinarily to not more than one such committee, and of representatives commonly to not more than two, or occasionally three; (3) a closer relationship between committees of the two houses, with provisions for joint rather than separate hearings, or arrangements for occasional action as a single committee, or again even, in some cases, a complete merging of House and Senate committees in a given field into a standing joint committee;² (4) a redefinition of committee subject-matter so as to correspond more closely to the main areas of national policy, and also to the major fields of administrative jurisdiction. In addition, there have been suggestions that joint committees on appropriations, military and naval affairs, or economy and efficiency be superimposed upon the existing committee system;³ also that each house create a “central” committee for purposes of coordination and planning, somewhat on the analogy of legislative

¹ On July 5, 1943, Senator Robert M. La Follette of Wisconsin introduced a resolution under which standing committees in the upper house would be reduced from the present thirty-three to thirteen. (78th Cong., 1st Sess., Sen. Res. 169). No action has thus far resulted or is anticipated in the near future. The great obstacle is, of course, the sacrifice of seniorities and of chairmanships that would be entailed.

² This last-mentioned plan (on the analogy of Massachusetts legislative arrangements) is advocated by R. Luce, former Massachusetts congressman, in his *Congress—An Explanation*, 30-32.

³ In 1944, both House and Senate set up special committees (but not a joint committee) on postwar economic policy and planning, and the House created such a committee also on postwar military policy.

councils in the states.¹ Here again, vested interests interpose weighty obstacles. No existing committee wants to be abolished; none wants to run the risk of being subordinated or absorbed into a corresponding committee of the other house; none wants to lose power or prestige to any super-committee, joint, "central," or otherwise; no member wants fewer chances than now for a committee chairmanship and its perquisites. There is, however, on Capitol Hill today a growing realization that for the admitted defects of the legislative process Congress is itself in no small degree to blame, and that many of those defects are traceable to a sprawling aggregation of standing committees which have hardly changed in a hundred years except to increase in number. If the interest stirred by recent discussions (especially among younger members) does not evaporate with the close of the war, some changes of at least a modest nature may be anticipated. And for any such, the country should be grateful; for the responsibilities now devolving upon Congress are heavier than ever before in its history, and upon the continued vitality and efficiency of Congress rests primarily the future of American democratic government.²

Relative Importance of Senate and House

An unstable equilibrium

In the early portion of our national history, the legislative center of gravity was clearly in the House of Representatives, as the constitution's makers intended it to be. After 1825, however, the Senate attained greatly increased importance, becoming, indeed, the main forum of legislative activity in the period preceding secession and the Civil War. From about 1870, the House recovered ground, partly because of a natural reaction against the Senate's high claims to authority (especially in the domain of foreign relations), but mainly because of the increasing proportion of senators whose principal claim to distinction was wealth or cleverness in political manipulation. But again, noticeably after about 1905, the pendulum swung back, and today the Senate, if not actually preponderant, is at all events of greater weight than two decades ago, and probably still gaining.³

Nor is senatorial ascendancy a mere matter of luck or chance; sub-

¹ This proposal is elaborated in H. Hazlitt, *A New Constitution Now*, Chap. xii. Cf. a suggestion in R. Young, *This Is Congress*, Chap. viii, for a "legislative cabinet" in each house, composed of the chairmen of standing committees (the committees themselves being reduced to nine or ten), and serving as a steering committee with power to prepare and initiate legislative programs.

² The vital matter of improved working relations between Congress and the executive will be touched upon in a later chapter (see pp. 391-394 below). Space is lacking for considering the need for better research and other staff equipment, especially for the committees (only three out of eighty-one standing committees now have expert staffs competent to cross-examine and to evaluate testimony); but persons interested will find a brief discussion of the subject in *Amer. Polit. Sci. Rev.*, XXXVIII, 507-510 (June, 1944). On the general subject of congressional reform, see (in addition to references already cited) R. Young, *This Is Congress*, Chap. viii; H. Hazlitt, *A New Constitution Now*, Chap. xii.

³ In the period of international readjustment which must follow the present war, its control over treaty-making will add to its prominence and importance.

stantial reasons for it can be found in various advantages which the upper house enjoys as compared with the lower. Its members are, on the average, somewhat older, have wider knowledge of public affairs, and, in particular, have more legislative experience because of longer terms, more numerous reflections, and continuous recruiting of vigorous members from the lower house. Its members, too, are commonly more important as party leaders within their states (and in some cases nationally) than are congressmen. Their smaller number gives men of talent a better chance to show their mettle and become known to the country at large. With rare exceptions, senators enjoy far more patronage than do congressmen; and the Senate's special powers of confirming appointments and assenting to the ratification of treaties place in its hands weapons which can be employed formidably in relation to other matters, as well. Finally, while it unhappily remains true, as Lord Bryce remarked many years ago, that neither branch of Congress attracts the best talent of the nation,¹ the upper house tends to absorb, sooner or later, the best that enters political life. Certainly the Senate today contains fewer men of wealth, and decidedly fewer political bosses of the Hanna-Quay-Platt type, than forty or fifty years ago. By the same token, it is less conservative than formerly; indeed, an examination of the records would probably give it a claim to be regarded as more liberal and progressive than the other branch. The greater proportion of congressional investigations are in point of fact senatorial investigations; and the Senate alone has shown any genuine interest in curbing the abuses of lobbying. While sometimes swayed by partisan passion, and prone to "play politics,"² as is the House, the Senate contains a larger proportion of members whose speeches and votes show independence of spirit and judgment; and, while handicapped by the propensity of mediocre members to stand stiffly on their rights under the rules and try the patience of the country with their obstinacy or buffoonery, it is composed, in at least as large degree as the House, of men who are able, industrious, fair-minded, sparing in speech, and anxious to get on with the public business.³

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¹ *Modern Democracies*, II, 52. Lord Bryce's discussion of the reasons makes illuminating reading. In brief, they are: (1) the dullness of congressional duties; (2) the scant opportunities for attaining distinction; (3) the requirement of residence in the member's state or district; and (4) the exceptional opportunities which America offers for careers in other directions.

² The Senate's record in relation to the spoils system is probably inferior to that of the House.

³ An interesting and suggestive characterization of Congress by a well-informed former member of the House will be found in a book already mentioned a number of times, i.e., R. Luce, *Congress—An Explanation*, Chap. v.

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CHAPTER XVII

THE POWERS OF CONGRESS—A GENERAL VIEW

Congress is commonly thought of as our national lawmaking authority; and such, indeed, it is.¹ Lawmaking, however, is only one of its many activities—in fact, not always the one that consumes the most time and energy. No fewer than six main functions are exercised by one house or both: (1) constituent, (2) electoral, (3) executive, (4) judicial, (5) directive and supervisory, and (6) legislative—an enumeration which of itself is sufficient to indicate that Congress, like the presidency, although established with a view to a separation of powers, deviates from that principle widely and often in its actual functions and workings.

Non-Legislative Powers

Some of the functions enumerated are considered sufficiently at other points in this book, and are mentioned here only in order that the full range and diversity of congressional activities may not be lost to view. When considering the method of amending the national constitution, we saw that, while Congress cannot under any circumstances independently make a change in the fundamental written law, not a syllable of the document can be altered without congressional approval.² When viewing the mode of electing the president and vice-president, we saw that Congress acts as a board to canvass the electoral vote and declare the results; and that, in the event of the lack of an electoral majority, the House of Representatives chooses the president and the Senate the vice-president.³ When discussing the executive functions of appointment and treaty-making, we presently shall observe how they are shared by the president with the Senate.⁴

1. Con-
stituent

2. Elec-
toral

3. Exec-
utive

The remaining three of the six major functions enumerated above, *i.e.*, judicial, directive and supervisory, and legislative, may properly receive some attention here.

The constitution endowed the president and Senate with broad powers of appointment; and in practice a general power of removal soon developed in the hands of the president and of appointing officers respon-

4. Judi-
cial

¹ Not however, our *only* such authority, notwithstanding what Art. I, § 1, of the constitution seems to say; for treaties and executive agreements have the force of law, judicial decisions declare law and in doing so may in effect make it, and rules and regulations laid down by the president, heads of departments, and administrative bodies are in effect laws and are treated by the courts as such if made in pursuance of authority validly "delegated" by Congress.

² See p. 39 above.

³ See pp. 240-242 above.

⁴ See pp. 356-357, 642-645 below.

sible to him.¹ But how could an unfit official be got rid of if the appointing officer failed to act? How could the president himself, in case of abuse of power or other official delinquency, be put out of office before the end of his elective term?

Impeach-
ment

The answer lay within easy reach in the historic device of impeachment; and with little division of opinion upon the point, the constitution's makers wrote into the document the well-known provision that "the president, vice-president, and all civil officers of the United States shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors."² Two points in this clause are especially to be noted. First, only civil officers are subject to impeachment: military and naval officers are liable to trial by court-martial, but cannot be impeached; and members of the legislative branch, although "civil," are construed not to be "officers" in the meaning of the impeachment provision.³ Second, the grounds on which impeachment proceedings can be brought are specified—as definitely, perhaps, as is feasible. Bribery is self-explanatory, and treason is defined by the constitution.⁴ "High crimes and misdemeanors" is a flexible phrase, but one which has generally been construed to include only offenses of a grave nature involving something more than mere inefficiency or partisanship.

Impeach-
ment
proce-
dure

The process of impeachment starts in the House of Representatives, where, upon charges being preferred against a given official, a committee is appointed to investigate. The committee reports to the House; and if, upon consideration of the findings, the majority so votes, the charges, in the form of "articles of impeachment," are sent to the Senate and at the same time a committee of "managers" is named by the House to conduct the trial. The Senate has no option but to hear the case. It furnishes the accused with a copy of the charges against him, fixes a date for the trial to begin, and when the time arrives converts itself into a court under the chairmanship of its regular presiding officer, unless the president of the United States is on trial, in which case the chair is occupied by the chief justice of the United States.⁵ The accused is allowed counsel, and he may appear and give testimony in person; and witnesses for and against him are brought in and questioned. At the close of the proceedings, which may last through many weeks, the gal-

¹ See pp. 358-362 below.

² Art. II, § 4. Provisions for the impeachment of state officers likewise found their way into most state constitutions.

³ The unsuccessful impeachment of Senator William Blount of Tennessee, in 1798, is the only case involving a member of Congress.

⁴ Art. III, § 3, cl. 1.

⁵ A plan for removal of high federal officers, including judges, through a special court is advocated in E. L. Bennett, "A Court of Qualifications as a Forum of Removals and Retirements," *Amer. Polit. Sci. Rev.*, XXXIII, 47-52 (Feb., 1939). Cf. H. Bingham, "A Proposed Constitutional Amendment Concerning Impeachment Proceedings," *U. S. Law Rev.*, LXV, 323-325 (June, 1931); Anon., "The Exclusiveness of the Impeachment Power Under the Constitution," *Harvard Law Rev.*, LI, 330-336 (Dec., 1937); L. R. Yankwich, "Impeachment of Civil Officers Under the Federal Constitution," *Georgetown Law Jour.*, XXVI, 849-867 (May, 1938).

leries are cleared and the Senate votes. A two-thirds vote is necessary to convict; anything less results in acquittal. The penalty in case of conviction is removal from office, to which may be added disqualification for ever holding "any office of honor, trust, or profit under the United States"; and the president's power of pardon and reprieve does not apply. Once retired to private life, furthermore, the convicted person, if he has committed an indictable offense, may be proceeded against in the ordinary courts like any other person.

In the entire history of the country, impeachment proceedings have been brought against only twelve federal officers;¹ and only four have been convicted. On charges based chiefly upon alleged violations of the Tenure of Office Act, passed over his veto in 1867, President Johnson came within one vote of being convicted in 1868. The only cabinet member impeached was also acquitted. All of the four officers actually convicted belonged to the judiciary; three were district judges, and one, tried in 1913, was a judge of the now defunct Commerce Court.

Past im-
peach-
ment
cases

Another congressional function, and one which people sometimes confuse with lawmaking in the proper sense, is that of direction and supervision. Acting directly, or by delegating carefully restricted authority to the president to act for it,² Congress establishes administrative agencies, fixes their powers and functions, and to some extent regulates their procedures; and while the funds for maintaining such agencies are requested by the president, on the basis of estimates prepared by the Bureau of the Budget, Congress alone can make the appropriations entailed. When considering such appropriations, it can scrutinize and criticize the work of any agency, and, if it chooses, curtail its activities or even, in effect, abolish it by leaving it without funds. At any other time, too, it can institute inquiries into the policies, actions, or procedures of offices, bureaus, or other establishments, through the medium of investigating committees which, serving somewhat after the manner of grand juries, have on various occasions been instrumental in exposing inefficiency or corruption, and sometimes have brought about remedial action.³ Not only in connection with such investigations, but at all other times, Congress can call upon administrative establishments for information and reports, to be transmitted either directly or through the president; and its supervisory relations with the great regulatory commissions, like the Interstate Commerce Commission and the Federal Trade Commission, are especially close. In establishing agencies, defining their functions, and making rules governing their activities, Congress employs the same machinery and procedures as when enacting measures having the character of law. In doing these things, it is, however, not making law, but only

5. Direc-
tive and
super-
visory

¹ The cases involving federal judges are listed on p. 472 below; the other cases involved Senator William Blount (1798), President Andrew Johnson (1868), and Secretary of War William W. Belknap (1876).

² See pp. 362-363 below.

³ On congressional investigations, see p. 402, note 1, below.

taking actions involved in running the government, somewhat as a board of directors acts in running a great business establishment; and attending to matters of this sort absorbs a surprisingly large amount of the time and energy of the two houses.

Legislative Powers—Some Fundamental Aspects

Legis-
lative

Delega-
tion of
power

After all, however, Congress is primarily a legislature. To it, indeed, the constitution assigns "all legislative power herein granted"¹—even though, as has been noted, the president, by constitutional provision, and the courts, by the inherent nature of their work, also have some share in lawmaking. A query that at once presents itself is: Can Congress delegate any of the legislative power conferred upon it to the executive or to some other branch or organ of the government, or must it exercise all such power by its own direct action? The question is an old one, and the constitutionality of numerous federal statutes has hung upon the Supreme Court's answer to it. Such delegation is nowhere expressly forbidden in the constitution; and although the phrase quoted above might seem to set up a presumption against it, the "implied powers" clause (authorizing Congress to make all laws necessary and proper for carrying into effect the powers vested in "the government of the United States, or in any department or officer thereof") might be construed to open a way for Congress to decide that in order to make the most effective use of its powers, it should delegate some of them to the president or, through him, to some administrative agency. And such delegations have many times been sustained by the Supreme Court.²

Illus-
trations

When, upwards of sixty years ago, it was proposed to vest in an expert independent commission the regulation of freight and passenger rates in interstate commerce, it was objected that this would be an unconstitutional delegation of legislative power. Nevertheless, Congress, convinced of the impossibility of dealing satisfactorily with such complicated matters by exact and detailed legislation, passed the Interstate Commerce Act of 1887, simply prescribing that all rates and services should be reasonable, and then delegating to the new Interstate Commerce Commission the duty of determining the reasonableness or unreasonableness of rates in specific cases.³ For similar reasons, powers of like nature have been conferred upon the Federal Trade Commission, the Federal Communications Commission, and a long list of other regulatory agencies, as well as also upon departments and other administrative agencies. The president, too, has been the direct beneficiary of many such delegations, as when, in 1934 (with later renewals), he was given authority to conclude trade agreements with foreign states raising or lowering tariff rates

¹ Art. I, § 1, cl. 1.

² See *Field v. Clark*, 143 U. S. 649 (1892); *Buttfield v. Stranahan*, 192 U. S. 470 (1904); *United States v. Grimaud*, 220 U. S. 506 (1911); and *Hampton & Co. v. United States*, 276 U. S. 394 (1928).

³ *General* 524, 527, 528, 529.

by as much as fifty per cent, thereby operating in a field, *i.e.*, tariff-making, traditionally regarded as of a legislative nature.

In upholding such delegations, however, the Supreme Court has insisted upon a vital distinction: powers that are merely administrative, it has said, may be delegated; powers that by their nature are legislative may not.¹ It is of the essence of legislation to lay down the rules, fix the standards, or specify the conditions that shall govern the president or an administrative agency in a particular area of activity; and these things only Congress is constitutionally competent to do. The more detailed business of applying the general regulations in day-by-day administration may properly be turned over to the administrators themselves—although, of course, powers delegated at this point may at any time be modified or even withdrawn. It was this distinction—or, rather, the failure to recognize it—that brought grief to much of the earlier legislation associated with the New Deal. Various “recovery” laws of 1933-34 undertook to confer upon the executive a sort of “roving commission” to make laws in the form of codes and regulations for trade and industry, but in doing so, failed to set up definite standards, or “yard-sticks,” to govern in exercising the powers bestowed. As a consequence, the Supreme Court, in case after case, overthrew the legislation; and while the Court, as constituted today, would probably view similar measures somewhat more tolerantly, the principle still is that a congressional delegation of power, to be sustained, must go no farther than to confer discretion in administering laws which themselves cover the essentially legislative aspects of the subject with which they deal.²

Limits
upon
delegation

In enacting much of the recovery legislation just mentioned, Congress is frequently said to have been acting under its “emergency powers”; and the impression is thus conveyed that the constitution confers some special class of powers designed to be used by Congress in time of great national stress. The fact is, however, that Congress has no power or group of powers labelled “emergency powers.” To be sure, there has been more than one great national emergency in our history; and the existence of such has been recognized officially by both president and Congress, as also by the courts. Nor can there be any denying that in times of economic and international crisis Congress has enacted laws which it would not have passed under ordinary circumstances. Nevertheless, as the Supreme Court has definitely said, “emergency does not

Emergency
powers

¹ It should be added in this connection that Congress may not delegate its essential legislative power to the states, as by authorizing them to regulate interstate commerce. Nor may Congress delegate its essential legislative function to the people, by authorizing them to make, through referenda, binding decisions upon matters of legislative policy. Congress, may, however, authorize an *advisory* referendum, as an aid in ascertaining the wishes of the voters. See W. W. Willoughby, *Constitutional Law of the United States* (2nd ed.), III, Chap. LXXXIX.

² On the judicial decisions growing out of the recovery acts—especially the National Industrial Recovery Act of 1933—see pp. 555, 573 below. Cf. C. B. Nutting, “Congressional Delegations Since the Schechter Case,” *Miss. Law Jour.*, XLV, 350-368 (Apr., 1942).

create power"; nor does it increase power already granted in the constitution; nor does it diminish the restrictions imposed upon the exercise of power.¹ At most, an emergency may merely require the exercise of powers long unused and justify new applications of power already existing. The constitutional basis for what are popularly called emergency powers must, therefore, be sought among the clearly granted powers; and it is to be found chiefly in the power to regulate foreign and interstate commerce and the currency, in the power to tax, to borrow, and to appropriate money, in the power to enact bankruptcy laws, and in the power to provide for the national defense. In new and unprecedented ways, these historic powers were turned to use by Congress in stimulating national recovery from economic depression during the period after 1932, and in promoting national defense in the period beginning in 1940, thus creating the popular illusion—but only an illusion—that some special reservoir of "emergency powers" had been tapped.

The
powers
of Con-
gress
not un-
limited

Fundamental, indeed, to our system is the fact that Congress has not full and unrestricted legislative power, like the British Parliament, but only the legislative power *herein granted*. In other words, every exercise of legislative power by Congress must be based upon some authorization in the constitution. When, therefore, legislation is proposed or demanded, its advocates must be able to point to some clause (or clauses) of the constitution which, either expressly or by fair implication, grants the necessary authority. If, on their part, opponents can show that constitutional sanction is lacking, or at least can point to adverse Supreme Court decisions, it will probably be useless to enact the proposed measure; for, once a test case is brought, the Supreme Court, which is the final judge of congressional powers, will almost certainly rule that Congress has exceeded its constitutional authority. This restricted scope of congressional power easily explains why debates on the constitutionality of proposed laws occupy so much time and attract such wide attention in connection with congressional proceedings.

Express
grants

The situation, in a nutshell, regarding the scope of congressional legislative power is that (a) such power is defined positively by numerous express grants, (b) it is defined negatively by almost equally numerous express prohibitions, and (c) between these two fields lies a broad, ill-defined, disputed domain of implied and resulting powers. Upon many matters there can be no question as to general congressional power (however much there may be as to detailed applications), because power has been conferred in definite and unmistakable terms. This is true of a long list of subjects enumerated in the eighth section of Article I, including currency, patents, copyright, bankruptcy, taxation, naturalization, the regulation of foreign and interstate commerce, the declaration of war, and the maintenance of an army and navy.

¹ *Home Building & Loan Assoc. v. Blaisdell*, 290 U. S. 398 (1934). Cf. J. P. Clark, "Emergencies and the Law," *Polit. Sci. Quar.*, XLIX, 268-283 (June, 1934).

Most of the powers expressly conferred upon Congress are permissive; that is to say, the two houses are constitutionally free to exercise them or not, in whole or in part. Some grants, however, are mandatory. For example, it is made the duty of Congress to call a convention of the states to revise the constitution whenever the legislatures of two-thirds of the states so request;¹ likewise to provide for taking the census every ten years,² and to make regulations for carrying appeals from the lower courts to the Supreme Court.³ In none of these instances, however, is there any way in which Congress can be compelled to act if it fails to obey the constitutional mandate. The sole remedy lies with the electorate, and consists in choosing congressional majorities which will observe the constitution's requirements.⁴

Permis-
sive and
manda-
tory
powers

On the other hand, not only are the powers of Congress limited in a general way by the federal nature of our government, but the framers of the constitution took pains to include in the instrument a number of express restrictions on congressional legislative activity. Certain of these appear in the bill of rights contained in the early amendments, where Congress is denied power to pass laws which interfere with religious freedom, or which abridge freedom of speech, of the press, or of the people peaceably to assemble and petition the government for a redress of grievances. But most such restraints are enumerated in the ninth section of Article I, where one finds that the privilege of the writ of *habeas corpus* may be suspended only when the public safety requires it in time of rebellion or invasion; that no bill of attainder or *ex post facto* law may be passed; that no preference may be given through commercial regulations or revenue laws to the ports of one state over those of another; that vessels bound to or from one state may not be required to take out clearance papers or pay duties in another state; that money may be drawn from the public treasury only in pursuance of appropriations made by law; that no tax or duty be laid on exports; and that no titles of nobility may be granted.

Express
prohibi-
tions

Further limitations are found in other parts of the constitution. Thus there are certain express and implied limitations relating to direct, indirect, and export taxes. In providing for the support of the Army, Congress may not make appropriations from the national treasury for a longer period than two years.⁵ By inserting in the constitution a definition of the crime of treason, the framers effectually prevented the legislative branch from extending the list of offenses which may be prosecuted

¹ Art. V.

² Art. I, § 2, cl. 3.

³ Art. III, § 2, cl. 2.

⁴ It may be noted in this connection that, like other legislative bodies, Congress can pass no irrevocable act. Any measure put on the statute-book by one Congress is legally subject to removal therefrom, or to any amount of amendment, by any subsequent Congress. On the question of whether Congress can repeal a statute by a concurrent resolution not submitted to the president for approval, see p. 374, note 2, below.

⁵ Art. VIII, § 8, cl. 12.

under that charge—just as they also imposed limitations by prescribing what the punishment for treason shall be.¹

Bases of
implied
powers

Where there are express grants or express restrictions, the authority of Congress to legislate, or its lack of power to do so, is usually sufficiently clear. On many subjects, however, the authority, if possessed at all, must be derived by implication or inference from some of the powers granted in express terms. That legislative power may legitimately be derived in this manner, the constitution itself practically asserts in the "implied powers" clause, which gives Congress authority to "make all laws which shall be necessary and proper for carrying into execution" the powers expressly vested by the constitution in Congress or in any other branch of the government.² Likewise, five of the last nine amendments expressly state that Congress shall have power to enforce them by "appropriate legislation."

Liberal
interpre-
tation of
congres-
sional
powers

Sharp differences of opinion over what measures may, and what ones may not, fairly be deemed "necessary and proper," or "appropriate," for carrying into effect the enumerated powers of the national government have made the powers of Congress "the great battle-ground of the constitution." "Around them have surged the legal combats of strict and broad construction, of tariff and taxation, of nullification, of secession, of the currency, and finally, of commercial regulation and corporation control."³ The Supreme Court early adopted a very liberal interpretation of these phrases, to the general effect that if it can be shown that Congress has been given authority to deal with any specific subject, in exercising that authority Congress is free to select any means or instrumentalities whatsoever which are not prohibited by the constitution and are appropriate, and which are consistent with the spirit as well as the letter of that instrument. Furthermore, whether a given law is "necessary," within the meaning of the constitution, is a "political" question, for Congress alone to answer; the courts will not rule upon it.⁴

Result-
ing
powers

Moreover, the scope of congressional authority has been considerably widened by decisions of the Supreme Court which have held that it is not necessary for Congress to trace back every one of its powers to some single grant of authority, direct or implied, but that such authority may be deduced from more than one of the specified powers, or from some or all of them combined.⁵ Powers derived in this way are commonly called "resulting powers." The criminal code of the United States affords a good illustration. The constitution gives the national government express power to punish only five forms of crime. Congress unquestionably has the power, however, to punish the violation of any national law and to pro-

¹ Art. III, § 3, cls. 1-2.

² Art. I, § 8, cl. 18.

³ J. T. Young, *The New American Government and Its Work* (rev. ed.), 132.

⁴ So many illustrations of laws passed under implied grants of legislative power have been, or will be, given in this book that no list need be added here. See especially Chaps. xxvii-xxviii.

⁵ *Shen v. Virginia*, 6 Wheaton 264 (1821).

tect prisoners in custody, even though such powers are neither expressly granted nor inferable from any single express grant in the constitution.

In recent years, the phrase "federal police power" has come into common use; and it calls, in this connection, for brief explanation. The police power in general has been defined as the power to restrict the rights of liberty and property in the interest of the public health, safety, morals, or general welfare. No such broad power is conferred upon Congress in the constitution, and the most common instances of its exercise are found in state legislation and municipal ordinances. Such police powers as Congress may be said to have are legally only special or peculiar forms of some express or implied power, in which the protection of the public health, morals, safety, or general welfare is prominently involved; and the sources from which they spring are mainly the power to lay taxes, to establish post-offices and postroads, and to regulate commerce. Illustrations of police powers springing from the last-mentioned source include the law limiting the hours of labor of persons employed in interstate commerce,¹ the meat inspection and pure food and drugs laws, the Mann white-slave act, the anti-crime acts of 1934, and the Fair Labor Standards Act of 1938.¹

The mere fact that Congress has been invested with authority to legislate upon a given subject does not necessarily mean that the states are thereby deprived of the right to legislate upon the same subject. Naturally, in all cases where the power has been expressly prohibited to the states, as, for example, in respect to coining money and laying duties on imports, Congress alone may legislate; and in such cases its power is said to be exclusive. Congress likewise has exclusive power in cases in which, from the nature of the power or from the nature of the subject to which the power relates, legislative power must necessarily be exercised by the national government alone—for example, naturalization and the regulation of foreign and interstate commerce. But in practically all matters which do not fall within these two classes, Congress and the state legislatures are said to have concurrent power; so that acts of Congress and state statutes relating to the same subject may be in full force at the same time. Thus, there may be both national and state control over congressional elections; and both Congress and the states may levy taxes on the same property or incomes.² The term "concurrent power" covers also certain powers which may be exercised by a state only until Congress exercises the same power. On bankruptcy, for example, every state originally was at liberty to make its own laws, and such laws had full force and effect until Congress chose to exercise its own

¹ See W. W. Willoughby, *Constitutional Law of the United States* (2nd ed.), II, Chaps. xli, xlii; R. E. Cushman, *Studies in the Police Power of the National Government* (Minneapolis, 1920).

² Cf. J. Dickinson, "The Functions of Congress and the Courts in Umpiring the Federal System," *Geo. Washington Law Rev.*, VIII, 1165-1178 (June, 1940); T. R. White, "New Theories of Constitutional Construction," *Univ. of Pa. Law Rev.*, XCII, 238-257 (Mar., 1944).

right to legislate on the subject. Once Congress had acted, any "concurrent" state bankruptcy laws, even though not formally repealed, fell into a condition of suspended animation:

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CHAPTER XVIII

THE PRESIDENT AND HIS CABINET

Presidential Tenure

When the constitution's framers made bold to plan a really new system of government for the country, they found little difficulty in deciding that there should be a national executive. The precise form to be given it, however, provoked controversy. Should supreme executive power be intrusted to a single official, or should it be vested in a board or commission? How should the executive be chosen? What should be the term, and should more than one term be permitted? In case a single executive was provided for, should a council be associated with him, on the analogy of the governor's council in the states? Above all, what should be the executive's powers, and what relations should the executive have with other parts of the governmental system? No problems that came before the Philadelphia convention, indeed, aroused greater differences of opinion than some of these. On twenty-one different days, the general subject of the executive was under discussion; on the method of election alone, more than thirty separate votes were taken.¹

The
problem
of the
executive
in 1787

A decision in favor of a single, rather than a plural, executive was, however, reached with no great difficulty. Most foreign precedents pointed in this direction, and every one of the American states had a single executive, *i.e.*, a governor or a "president." The plan offered the obvious advantages of prompter action and more concentration of responsibility; and while it might seem to open the way for executive tyranny, and even for monarchist maneuvers, fear of such miscarriages was allayed by prescribing a fixed term, restricting powers, and providing for removal by impeachment. If the executive had been made, as some members desired, nothing more than an agency to carry into effect the will of the legislature, the plural form would probably have been adopted; and this might have left matters in such a position that a cabinet type of government could have developed. But after it was decided that the executive should be a coördinate branch, drawing authority independently from the people and charged with many duties besides the enforcement of the acts of Congress, it was both natural and wise to concentrate power and responsibility in the hands of a single person.

A single
executive
decided
upon.

Several members of the convention were willing that the president should hold office indefinitely, or during "good behavior"; and Hamilton expressed a preference for life tenure, subject to removal by impeach-

Term
and re-
eligibil-
ity:

¹ M. Farrand, *The Framing of the Constitution*, Chap. XI.

ment. The prevailing sentiment, however, favored a fixed term; and the question narrowed down to (1) a seven-year term without eligibility to reelection or (2) a four-year term with no such restriction. At one stage, the seven-year plan was adopted. But when it became clear that the president was not to be chosen by Congress, the main objection to reëligibility disappeared, and the briefer term, without restriction as to reelection, was substituted.¹

1 Precedents against a third term

In the course of time, it became a tradition that a president should not have more than two terms. Washington's advanced age and dislike of party strife led him to refuse to be a candidate for a third term. Jefferson, who originally favored a single seven-year term, could doubtless have been elected a third time, but he also declined. Jackson's popularity would probably have insured him a third election; but he publicly endorsed the policy of his predecessors in the matter² and in 1836 threw his support to Martin Van Buren. General Grant, in 1880, was induced to break with precedent by seeking a nomination for a third, although non-consecutive, term. But the public disapproved, and the effort failed. In 1912, Theodore Roosevelt also sought a third term, after being out of office for four years. President Taft received the regular Republican nomination; whereupon the Roosevelt following organized a new party, nominated their leader, and launched a campaign which won many more electoral votes than were received by the regular candidate. The third-term aspirant was, however, not elected. President Coolidge's coy announcement in 1927 that he did not "choose to run" for reelection in 1928 did not prevent a large amount of third-term talk as campaign time approached; and a skeptical opposition group in the Senate induced that body to adopt a resolution declaring any departure from the no-third-term principle "unwise, unpatriotic, and fraught with peril to our free institutions." This rather flamboyant declaration was, of course, a mere expression of opinion, wholly devoid of legal effect. Naturally, the point was made by Coolidge supporters that even if the incumbent were renominated (as he very likely could have been) and reëlected, he would have had only two full, elective terms in office.³ But an amendment to the resolution making it applicable only to presidents who had served "two elected terms" was rejected.⁴

2. The no-third-term tradition broken in 1940

Hardly a textbook on American government down to 1940 failed to cite the no-third-term tradition as a choice illustration of the way in which the actual, working constitution grows through usage or custom. Then, how-

¹ An incidental effect of the Twentieth Amendment, adopted in 1933, was to shorten the first term of President Roosevelt (and of Vice-President Garner) by a month and a half, by terminating it on January 20 instead of March 4, 1937.

² Indeed he repeatedly advocated a constitutional amendment limiting the president to a single term of four or six years.

³ He had succeeded to the presidency upon the death of Harding in 1923 and had been elected to the office only once, i.e., in 1924.

⁴ See W. B. Munro and W. Lippmann, "Shall We Break the Third-Term Tradition?" *FORUM* LXXIII 162-172 (April 1927)

ever, came a shock: a president—Franklin D. Roosevelt—was elected to a third term! There will always be differences of opinion as to the motivation of this third-term candidacy. At the time, charges were flung about that the two-time president preferred to shatter national tradition rather than surrender leadership in carrying the New Deal program through its later stages, and even that he was animated by sheer love of power. It is fairer, however, to accept his own explanation (as given by radio to the Chicago convention that renominated him), namely, that until after the outbreak of war in Europe in the autumn of 1939 he expected to retire at the end of his second term, but that in the meantime the relation of the United States to the world situation had grown so critical as to make it his duty to offer the country the advantage of continuous presidential experience and leadership during the emergency.¹ With the third term as a major issue, the campaign brought out arguments (1) that no man ought to be subjected to the physical strain of the presidency for longer than eight years, (2) that the powers of the office have come to be such that intrusting them to the same hands for more than eight years would be dangerous to our republican institutions, (3) that no man in any office is indispensable to the well-being of a great nation, and (4) that with the barrier to a third term once broken down, the way would be open to a fourth and a fifth, and indeed to an indefinite prolongation of power. On the other hand, it was contended (1) that—as was true—the constitution's framers had contemplated indefinite reeligibility, (2) that there was nothing sacred about the no-third-term tradition, (3) that the people have means of protecting themselves against too long tenure or other abuse of the presidency, and especially (4) that in the existing emergency it was to the nation's interest to retain in the White House a president having the personal qualities, the long experience, and the superior information undeniably possessed by the then incumbent. By keeping the country, and even his personal friends, in the dark as to his intentions throughout the pre-convention period, Mr. Roosevelt cleverly prevented the development of any serious rival candidacies; and although his nomination at Chicago was not by the acclamation hoped for, it fell not much short of it, and four months later the country ratified it—not overwhelmingly in terms of the popular vote, but by an electoral vote of 449 to 82.²

¹ It is thought that, but for the state of his health, Woodrow Wilson, viewing the presidency as the American equivalent of the British premiership, would have been favorably inclined toward a third term. E. S. Corwin, *The President: Office and Powers*, 36.

² See "How Long Should a United States President Hold Office?" [Symposium], *Cong. Digest*, XVII, 136-160 (May, 1938); M. R. Eiselen, "The Roosevelts and the Third-Term Tradition," *Social Sci.*, XV, 27-34 (Jan., 1940); W. Thornton, *The Third-Term Issue; Hot Potato of American Politics* (New York, 1939); F. Rodell, *Democracy and the Third Term* (New York, 1940); C. W. Stein, *The Third-Term Tradition; Its Rise and Collapse in American Politics* (New York, 1943). Sen. Judiciary Committee, *Hearings* (1940): "Third Term for President of the United States" Practically all of the viewpoints in opposition to a presidential third term will be found presented and reiterated in articles by Raymond Moley in *Newsweek* throughout the period of the 1940 campaign.

A fourth
term
also

As indicated above, there were those in 1940 who considered that, in the words of Professor Corwin, "If the anti-third-term taboo [was] once set aside, it [would] take a long time for an anti-fourth-term or anti-fifth-term taboo to develop. In a word, the presidential term [would] become indefinite—just what in 1787 it was expected to be."¹ As the year 1944 approached, with the country immersed in a global war, indications grew that President Roosevelt could, and would, expect another nomination at the hands of his party. Once more, by keeping silent substantially to the date of the nominating convention, he fostered the presumption of such a nomination, frustrating any possible development of rival candidacies; and when finally he spoke, it was to say in the same breath that while on every personal ground he would prefer to retire, the country's need for continuity of leadership in so critical a period would influence him to remain at the helm if again nominated and elected. The renomination that quickly followed (again at Chicago)—although, as in 1940, not unanimous—was merely a bit of routine; and anything resembling a no-fourth-term tradition was scotched before it had time to begin to form. The outcome, after a spirited campaign, was still another reelection; and, times and situations being what they were, and all precedent having been shattered in any case, the matter of a fourth term weighed more lightly with the voters than had the third-term question in 1940.

Propo-
sals for a
single
six-year
term

Naturally enough, the 1940 third-term battle and the growing prospect of a fourth term brought out proposals to amend the constitution so as to restrict a president to two four-year terms,² or even to a single term of six years. There have always been people who, considering that a president eligible for reelection can hardly escape temptation to make appointments, wield the veto power, and otherwise shape his course with an eye to continuance in office, believed that it would be better if there were no reeligibility to even a second term; and single-six-year-term proposals began making their appearance in Congress as early as 1828.³ Reflecting the stir created by Theodore Roosevelt's third-term candidacy in 1912, Woodrow Wilson was chosen to the presidency in that year on a platform advocating an amendment making the chief executive ineligible for reelection;⁴ and in 1913 the Senate adopted a resolution in favor of an amendment lengthening the presidential term to six years and

¹ E. S. Corwin, *The President: Office and Powers*, 38.

² The Republican candidate in 1940, Wendell L. Willkie, promised that if elected he would, in his first message to Congress, recommend the adoption of a constitutional amendment limiting the tenure of any president to "eight years or less."

³ In all, no fewer than one hundred constitutional amendments of this purport have been introduced.

⁴ The candidate did not himself endorse this plank. On the contrary, in a letter written early in 1913 (although not made public until 1916), he declared that a "fixed constitutional limitation to a single term of office" would be "highly arbitrary and unsatisfactory from every point of view" (*Amer. Year Book*, 1916, 34); and, as has been indicated, he apparently would not have been averse to trying for a third term if the state of his health had permitted.

forbidding any person who had held the office by election or under operation of the law of succession to hold it again "by election." Although reported favorably by the judiciary committee, this proposal did not come to a vote in the House of Representatives; and revival of it in the next Congress was similarly barren of result. During the 1940 campaign, a Senate judiciary sub-committee held hearings on a single-six-year-term amendment proposed by a disaffected Democratic senator, Edward R. Burke; but Administration and party leaders naturally frowned on the proceedings, and the effort came to nothing. It is a matter of record that at least two former presidents favored an amendment of the kind;¹ and during the 1940 campaign a former Democratic candidate for the office (John W. Davis) took a similar position. When, in 1943, a different sort of amendment, fixing an eight-year limit for future presidents, was brought before Congress, nothing resulted (aside from committee hearings in the Senate), even though the proposal was introduced and somewhat liberally supported by members of the majority party.²

Whatever additional qualifications a president may be expected to have, he must meet three explicit tests imposed by the constitution: (1) he must be at least thirty-five years of age; (2) he must have been a resident of the United States for at least fourteen years (not necessarily—as illustrated in the case of Hoover—the last fourteen before election); and (3) he must be a "natural-born" citizen. Inasmuch, too, as the vice-president may at any time be called upon to take up the duties of the presidency, he should have all of the qualifications required for that office.

Benjamin Franklin argued in the Philadelphia convention that, since wealth and power are the corrupting allurements which human nature finds it hardest to resist, the president should be allowed nothing whatever from the public treasury beyond his expenses. But though the famous Pennsylvanian had the reputation of being the wisest man of his day, his proposal was not even put to a vote; and by constitutional provision the president receives a salary, with the safeguard that it may be neither increased nor diminished during the period for which he has been elected. He is forbidden to receive any other emolument, either from the United States or from any state. But this is construed not to prevent the United States from providing him with a dignified colonial mansion (the White House), a suite of executive offices, a secretariat, and special allowances for automobiles, furniture, repairs, entertainment, and travel,

Presi-
dential
qualifica-
tions

Salary
and al-
lowance

¹ Jackson and Taft. For Taft's views, see his *Our Chief Executive and His Powers* (New York, 1916), 4.

² The best brief discussion of the subject of presidential reëligibility is E. S. Corwin, *op. cit.*, 31-38. C. W. Stein, *The Third-Term Tradition; Its Rise and Collapse in American Politics*, mentioned above, is a very good history of the successive attempts to overthrow the tradition. An objection often raised against the proposed six-year term is that, if the House of Representatives were to continue to be chosen for only two years, the chances of executive-legislative discord would be enhanced, since there would be two interim congressional elections instead of only one as now.

amounting to some \$450,000 a year.¹ Originally fixed at \$25,000 annually, the president's salary was raised in 1873 to \$50,000, and in 1909 to \$75,000.

Presidential Burdens and Provisions for Assistance

The
president
at work

Some presidents put in longer hours and work harder than others, but for none is the office a sinecure; few are as fit when they leave the White House as when they entered it. There is, first of all, a vast amount of administrative routine. Much can, of course, be turned over to subordinates; but much also is of such a nature that the president cannot escape it. The daily grist of correspondence is exacting and time-consuming. Heads of departments, members of Congress, party leaders, spokesmen of business interests, and a wide variety of other people must be given personal interviews. Delegations, official and unofficial, must be welcomed. State receptions and dinners must be held. Appointments to public office make heavy demands. When Congress is in session, there are bills to be studied, programs of legislation to be mapped out, innumerable conferences to be held; and even during legislative recesses, much may need to be done for the furtherance of legislative projects which the chief executive has at heart. Foreign relations call for much—in periods of stress like the last few years, almost constant—attention. Preparation of messages and of public addresses chains the president to his desk; cabinet meetings, official entertainment of foreign and other guests, interviews with representatives of the press, and participation in public ceremonies take their toll of energy and time. And as if all this were not enough, the president is expected to exercise a general watchfulness over the state of the country and at times of crisis—such as the stock-market crash of 1929, the great droughts of 1930 and 1934, and the banking *débâcle* of 1933—to devise, guide, and lead in carrying out measures of relief and remedy. Though assisted by a White House "secretariat" considerably increased in numbers and improved in efficiency, President Hoover found even less leisure than did most of his predecessors, not simply because by nature he was a "twelve hour a day man," nor even because the last two and a half years of his administration proved a peculiarly trying time in the life of the nation, but because the volume of even the normal work to be done mounts from year to year and almost from day to day. With a titanic program of national recovery and social rehabilitation on his hands, later an equally stupendous program of national defense, and eventually a global war of staggering proportions (with the White House the focal point of the combined stresses of a dozen military fronts) Presi-

¹ W. Hard, "The White House Plant," *World's Work*, LVIII, 46-53, 106-116 (Jan., 1929). The cost of unofficial entertaining is borne by the president himself, but that of official functions is met out of a fund of \$30,000 given the chief executive every year to spend at his discretion. Custom has it that if adherents of more than one political party are present, a function is "official," otherwise not.

dent Roosevelt—although temperamentally fitted to carry a great load with a minimum of strain—much of the time lived and worked under pressure that could not fail to take heavy toll.¹

In a significant report submitted early in 1937, the President's Committee on Administrative Management in the Government of the United States (composed of three outstanding students of government, and appointed by President Franklin D. Roosevelt to consider desirable improvements in the national administrative system²) asserted that in view of the enormous growth of the work to be done, the president's "immediate staff assistance" was "entirely inadequate," and proposed a plan for not to exceed six administrative assistants who should serve as his "direct aids in dealing with the managerial agencies and administrative departments of the government"—such assistants to be in addition to the three existing presidential secretaries dealing, respectively, with the public, with Congress, and with the press and radio. Almost immediately, President Roosevelt presented to Congress a more ambitious plan for strengthening and developing the "management arms" of the chief executive having to do with (1) budget and efficiency research, (2) planning, and (3) personnel—all being matters outside of the executive departments, but vital to efficient management of the government.³

The
Execu-
tive
Office of
the Presi-
dent

Provision for the six administrative assistants was forthwith made by Congress, and appointees have been serving, quietly but effectively, since the year mentioned. The larger project encountered some delay, but by executive order of September 8, 1939, issued in pursuance of powers granted the president in the Reorganization Act of the previous April 3,⁴ there was introduced into the picture an Executive Office of the President which (after various changes in the meantime) nowadays embraces six larger or smaller establishments as follows: (1) the White House Office, including the presidential secretaries and administrative assistants, and serving the president in the performance of the many detailed duties incident to his immediate office; (2) the Bureau of the Budget, dating originally from 1921, and for two decades attached in form to the Treasury although practically an independent establishment under presidential

Present
organiza-
tion

¹ For "human interest" accounts of the president at work, one may turn to I. H. Hoover, *Forty-two Years in the White House* (Boston, 1934), by a shrewd observer who served under several presidents as chief usher at the White House; W. Irwin, "Portrait of a President [Hoover]," and "The President's Job," *Sat. Eve. Post*, CCIII, 25 (Jan. 17, 1931), and CCIII, 25 (Mar. 7, 1931); and D. Pearson and R. S. Allen, "How the President [Franklin D. Roosevelt] Works," *Harper's Mag.*, CLXXIII, 1-14 (June, 1936). Cf. biographies of various presidents.

² See pp. 411-412 below.

³ In doing so, he said: "[I]t has been common knowledge for twenty years that the president cannot adequately handle his responsibilities; that he is overworked; that it is humanly impossible, under the system which we have, for him fully to carry out his constitutional duty as chief executive because he is overwhelmed with minor details and needless contacts arising directly from the bad organization and equipment of the government."

⁴ See pp. 410-411 below.

control;¹ (3) the Office for Emergency Management, dating from 1940 and comprising a framework within which large numbers of major civilian war agencies, such as the Office of Defense Transportation and the War Production Board, have been established;² (4) The Liaison Office for Personnel Management, established in 1939, and headed by one of the six administrative assistants; (5) the Committee for Congested Production Areas, created in 1943, and occupied with coördinating federal, state, and local efforts to solve problems relating to facilities and services in congested war-production areas; and (6) a War Refugee Board, created in 1944 to aid in the rescue and relief of victims of enemy oppression. Obviously, certain of these units, having to do with wartime activities, are only temporary. But others provide the president permanently with facilities needed by the chief executive of any modern state for the proper discharge of his responsibilities. In the president's case, the responsibilities themselves have hardly been lightened; but the improved machinery for administrative "housekeeping" has at least simplified and expedited the labors which they entail.³

The Vice-Presidency and Arrangements for Presidential Succession

Since presidential elections take place only at regular four-year intervals, some arrangement is necessary for filling out a term in case the president dies, resigns, or is removed by impeachment; and the constitution provides for a vice-president, who is to take up the duties of president whenever the office falls vacant or the president is himself unable to discharge them.⁴ No president has resigned; none has been removed, although the impeachment proceedings against Andrew Johnson failed by a single vote; and no president has been incapacitated to such an extent or for so long a period as to lead to the assumption of presidential functions by the vice-president, although such a transfer of authority was seriously discussed after the wounding of President Garfield by an

¹ See pp. 485-487 below.

² See pp. 687-688 below.

³ We have a General Staff for the Army. The Executive Office of the President may be regarded as in a sense a General Staff for the president on the civilian side.

An informing symposium on the Executive Office of the President (before certain changes were made in it) will be found in *Public Admin. Rev.*, I, 101-140 (Winter, 1941). Cf. M. R. Eiselen, "Work Relief for Presidents," *Social Sci.*, XII, 201-205 (Apr., 1937), and especially N. M. Pearson, "A General Administrative Staff to Aid the President," *Pub. Admin. Rev.*, IV, 127-147 (Spring, 1944). An Office of Government Reports originally included was, in 1942, transferred to and consolidated with the Office of War Information (see p. 690 below), and a National Resources Planning Board was abolished in 1943 (see p. 598 below).

⁴ Under the language of the original constitution, the vice-president succeeds only to the "powers and duties" of the office, not to the office itself, and hence in 1927 it was argued that another term for Mr. Coolidge would not be a third term as president. The Twentieth Amendment, of later date (1933), however, says that if a president-elect dies before taking office, the vice-president-elect "shall become president."

⁵ On the way in which a president or vice-president may resign—a matter unprovided for in the constitution—see note by E. S. Brown in *Amer. Polit. Sci. Rev.*, XXII, 732-733 (Aug., 1928). One vice-president has resigned, i.e., John C. Calhoun in 1832. Cf. *Code of the Laws of the U. S.* (1934), p. 27.

assassin's bullet in 1881, and also during the earlier stages of President Wilson's illness in 1919-20.¹ Seven presidents, however, have died in office, and seven vice-presidents have in consequence assumed the duties of the presidency. Since Van Buren, no vice-president has been elected president unless he had first succeeded to the office by the death of the incumbent.

Unless an emergency makes it necessary for him to assume the powers and duties of president, the vice-president² has no constitutional function except to preside over the Senate; even there he is not a member and has no vote except in the case of a tie. He is, in reality, an executive officer, with, however, only potential, rather than actual, powers and functions. But he may at any moment be called upon to take the helm of the government, and it goes without saying that he will do well to keep informed on the state of public affairs and on the policies and plans of the Administration. From the vantage point of the presiding officer's chair in the Senate, he will, of course, learn much of what is going on in legislative circles. He needs also, however, to be in close touch with the executive side of the government; and an obvious means to this end is attendance at meetings of the cabinet. Calvin Coolidge, John N. Garner, Henry A. Wallace, and Harry S. Truman are, however, the only vice-presidents in the country's history who have sat with the cabinet with any regularity.²

The vice-president's share in the work of government

¹J. Kerney, "Government by Proxy," *Century Mag.*, CXI, 481-486 (Feb., 1926). No definition of presidential inability is laid down in the constitution or the laws, and there is no specification of who is to decide when the president's disablement is so serious and prolonged that an "acting president" is needed. The commonest opinion in 1919-20 was that the decision lay with the vice-president, with or without ratification by Congress.

No provision is made for a substitute when the president is temporarily absent from the country, as was Woodrow Wilson during the Paris Peace Conference of 1919 and as was Franklin D. Roosevelt repeatedly in connection with wartime conferences such as those at Casablanca, Cairo, Teheran and Yalta. Modern means of communication, however, enable a president to keep in close touch with Washington, wherever he may be.

²C. O. Paullin, "The Vice-President and the Cabinet," *Amer. Hist. Rev.*, XXIX, 496-500 (Apr., 1924). Although lukewarm, or even hostile, toward some of the policies of the Roosevelt Administration, Vice-President Garner's strong sense of personal and party loyalty, together with his exceptional familiarity with congressional business (acquired in part as a former speaker of the House of Representatives), made him more of a power in the government of his day than vice-presidents have commonly been. See current newspapers for the rôle which he played during an interval of party and congressional confusion in the last two weeks of July, 1937 (e.g., *N. Y. Times*, July 20). Having himself originated some of the basic principles of the New Deal—marshaling, also the data and ideological argument for defending them—and seeing eye to eye with his chief at practically every point, Vice-President Wallace likewise could be depended upon to invest the vice-presidency with unusual vitality. Quite unprecedented, indeed, was his active service, from the summer of 1941, as chairman of the Economic Defense Board (later the Board of Economic Warfare), consisting of various cabinet members and charged with coordinating the actions and policies of defense agencies and with developing integrated defense plans. In 1943, however, Mr. Wallace was rebuked by the President for quarreling publicly with the secretary of commerce and was removed from his chairmanship by conversion of the Board of Economic Warfare into the Office of Economic Warfare under another chairman; and in 1944 the equivocal support given him by the President, combined with conservative (especially Southern) disapproval of his affiliations with some of the more radical elements in the country's politics, cost him the nomination for a second term.

Further
provi-
sions for
succe-
sion

If occasion arises, the duties of the presidency devolve upon the vice-president. But, obviously, there is no guarantee that at any given time there will be a vice-president; this official may himself have died,¹ resigned, been removed, or become incapable of attending to public business. Moreover, after a vice-president has assumed the presidency, there would be no one—unless further arrangements were made—to step into the highest office should it again fall vacant. Accordingly, the constitution empowers Congress to provide for the case of removal, death, resignation, or disability, both of the president and vice-president, "declaring what officer shall then act as president."² The first legislation on the subject, dating from 1792, provided that the president *pro tempore* of the Senate should succeed, or in case no such official should be available, the speaker of the House of Representatives. But for several reasons this was not a satisfactory arrangement. Under it, the presidency would devolve upon a person who had been sent to the national capital to be, not an executive, but a legislator. It might also bring the government under the direction of a chief executive belonging to a different party from that to which the president and vice-president had belonged. Still more serious, if both the president and vice-president should die during the interval between the expiration of one Congress and the meeting of the next, there might be no president *pro tem.* of the Senate, and there certainly would be no speaker of the House. In spite of this, the law stood unchanged for almost a hundred years. In 1881, however, the death of President Garfield, some weeks before a newly elected Congress convened, brought the matter vividly to the country's attention, and five years later a new presidential succession act withdrew the officers of the legislative houses from the succession and substituted a plan under which, after the vice-president, the heads of the executive departments succeed—in a sequence prescribed by the law—due regard being paid, of course, to the constitutional qualifications of age, citizenship, and residence. Never as yet, however, has the succession actually passed beyond the vice-president.³

The act
of 1886

The Cabinet

Early
question
of an ad-
visory
council

As early as 1781, when the first executive departments were created by the Continental Congress, it was suggested that their principal officers consult together as an advisory council, and in the convention of 1787 several plans for a council—a council of appointment, a council of revision, or a general advisory council—were considered. No proposal on the

¹ In point of fact, seven vice-presidents have died in office, but luckily not one, as it turned out, who would have been called upon to assume the duties of a deceased president.

² Art. II, § 1, cl. 5.

³ For a proposal that the vice-presidency be abolished and that any vacancy in the presidency be filled by election by the two houses of Congress in joint session, see H. H. Hartzell, *A New Constitution Now* (New York, 1942), 226-229.

subject, however, was adopted, and it remained for an official advisory group, consisting of the heads of the later ten departments, to form around the president, not in response to any constitutional or statutory provisions, but as a mere matter of convenience and usage.¹ To this day, the "cabinet" is, as such, quite unknown to the formal constitution and recognized only casually in statutes.

From the beginning of his first administration, Washington, in addition to calling on the heads of departments for written opinions, as authorized in the constitution, discussed matters orally with various principal officers, including the department heads; and in 1793, the disturbed international situation—more concretely, the crisis with France—caused these consultations, with what was already beginning to be called a cabinet, to become relatively frequent. Some people shook their heads and predicted that from this "cabinet conclave," unknown to the constitution, would flow all manner of abuses. We can easily enough see now, however, that some such development was inevitable. In common with other public men of the day, Washington originally supposed that the Senate—small in numbers and constitutionally associated with the executive in appointments and treaty-making—would serve substantially as an executive council, after the manner of upper chambers in most of the colonial governments. But when he appeared on the floor of that house to consult about certain Indian treaties, the demeanor of the members clearly showed that they did not take this view of their functions, and the expected relationship did not develop. Furthermore, contrary to practice in England and in the colonies, the courts, in 1793, announced it as their policy not to give opinions, even to the president, except in deciding actual cases; hence the need for consultation could not be met in that direction. Finally, the House of Representatives discouraged—indeed, virtually prevented—heads of departments from appearing on the floor in person in order to submit reports, answer questions, and participate in discussion. As a consequence of all these more or less independent but contemporary developments, the president and heads of departments were together forced into the relatively isolated position characteristic of our American scheme of "divided" government, and compelled to rely

How the cabinet arose

¹ The heads of departments as chiefs of separate branches of the administrative establishments are dealt with on pp. 403-406 below. Since the creation of the Federal Security Agency, the Federal Works Agency, and the Federal Loan Agency in 1939, there have been administrative establishments in Washington, even in peacetime, larger in personnel and perhaps more important in function than at least one or two of the ten departments; and their "administrators" have occasionally sat with the cabinet. Any one, in fact, may so sit if invited by the president. The regular cabinet members are, however, the department heads.

During the present war, President Roosevelt did not emulate the example of President Wilson in World War I in maintaining both the regular cabinet and a "war cabinet" consisting of three regular cabinet members and six high defense officials, the two cabinets meeting alternately; but he often invited heads of defense establishments such as the War Production Board to attend particular cabinet meetings.

² We shall find that nowadays there are many proposals that both houses adopt a different policy. See p. 391 below.

upon one another for opinions and advice to an extent originally unanticipated. The upshot was the cabinet.¹

Varying
relations
with the
president

To this day, the cabinet has remained what it was at the outset—a purely advisory body. The president can make much use of it, or little, or none at all, as he chooses. Looking upon the heads of departments as mere administrative officers, and preferring the advice of his personal friends, official and otherwise, Jackson early discontinued cabinet meetings altogether; and some other presidents, e.g., Grant, much of the time Wilson, and in his first years Franklin D. Roosevelt, have leaned but lightly on their cabinet advisers. On the other hand, certain presidents, e.g., Pierce and Harding, have consulted their cabinets at every turn and have usually followed the advice received. An able cabinet can go far toward making up for the deficiencies of a weak president, and can also give added strength to a strong one.

Meetings
and in-
fluence

Nowadays, the cabinet meets ordinarily once a week (except during vacation and campaign periods), though naturally oftener in time of war or other stress.² Ranging widely over problems and policies of the Administration (not omitting their party aspects),³ discussions are directed mainly to matters, large or small, which the president himself introduces, although others may be brought up—usually with consent secured in advance—by the department chiefs.⁴ Proceedings are decidedly informal. There are no rules of debate; free interchange of opinion takes place in a conversational manner; only rarely is there a vote; no minutes or other official records are kept, and sometimes differences of opinion develop afterwards as to whether a given subject was considered at all.⁵ Furthermore, such decisions as are reached are mere recommendations.⁶ Just as the president is free to submit or not submit a matter for consideration,⁷ so is he free to make any final disposal of it that he likes.

¹ The beginnings of the cabinet are described fully in H. B. Learned, *The President's Cabinet* (New Haven, 1912), Chap. v.

² Much of the time—as recently as Franklin D. Roosevelt's earlier years—there have regularly been two meetings a week. No one is entitled to call a meeting except the president. During Wilson's illness, Secretary of State Lansing incurred his chief's displeasure by taking it upon himself to call meetings, and his forced retirement soon followed.

³ Frank Knox, a Republican appointed secretary of war by President Roosevelt in 1940, was accustomed to slip discreetly out of cabinet meetings when discussions assumed a partisan tone.

⁴ Because of lack of confidence in his advisers' competence, or because of a desire to proceed strictly according to his own ideas and meanwhile to keep even the cabinet in the dark, the president may (as Wilson sometimes did) withhold completely from discussion some of the weightiest matters of the hour.

⁵ A good deal of interesting information about cabinet meetings can be gleaned from published correspondence, memoirs, and autobiographies of ex-members, such as *The Letters of Franklin K. Lane* (Boston, 1922); W. C. Redfield, *With Congress and Cabinet* (Garden City, N. Y., 1924); and D. F. Houston, *Eight Years with Wilson's Cabinet*, 2 vols. (Garden City, N. Y., 1926).

⁶ When President Franklin D. Roosevelt and two or three intimate advisers worked out the plan for the famous Court bill of 1937 (proposing, among other things, to add six new justices to the Supreme Court), the measure was shown to the attorney-general only in order that he might prepare a supporting letter, and was communicated to the cabinet only a few moments before it exploded in Congress and touched off a barrage of bitter discussion throughout the country. See p. 472 below.

Ordinarily, he will be influenced by the views of the men whom he has chosen to be his principal advisers. But if he thinks that their advice is not sound, he is under no compulsion to follow it. It is he, not they, who will have to bear ultimate responsibility before the country for whatever is done. "Seven nays, one aye—the ayes have it," announced Lincoln, following a cabinet consultation in which he found every member against him. Cabinet discussions bring out useful information and opinion, clarify views, and promote morale in the Administration. They help the president pick his course in both international and domestic affairs. But they do not culminate in decisions upon policy by mere show of hands.

No president, of course, relies upon his cabinet alone for advice; some, indeed, *e.g.*, Jackson, have notoriously preferred other sources. Members of Congress (especially the majority leaders), old friends and associates, bankers, business men, labor leaders, experts on social and economic problems—these are only a few of the people who will be found wending their way to the White House, either by invitation or on their own initiative. During the earlier years of Franklin D. Roosevelt's presidency, the cabinet was, on the one hand, pretty much submerged in a "super-cabinet," known as the National Emergency Council, and consisting, in addition to the heads of departments, of some two dozen heads of new recovery agencies and persons brought in as experts from outside of government circles, and, on the other hand, pushed into the background by the so-called "little cabinet," a galaxy of "intellectual"—largely professorial—experts and reformers (Moley, Tugwell, Corcoran, Cohen, Berle, and others) appointed, for the most part, to under-secretaryships and assistant-secretaryships and comprising the group popularly dubbed the "brain trust." As conditions became more normal, the regular cabinet emerged in something like its full stature, although outsiders continued to have much influence and the professional brain-trusters merely gave way to non-academicians, chiefly young lawyers. The President's principal adviser for a number of years (Harry Hopkins) was not a cabinet member except for a brief period; and in general—apart from wartime necessities—Mr. Roosevelt preferred to have "idea" men (Henry A. Wallace was generally in favor as such), around him rather than administrators. Certainly it was chiefly the former who imparted slants to his attitudes, decisions, and policies.

Department heads—that is to say, cabinet members—are selected with both their administrative and advisory functions in mind. Several other considerations, however, enter in. First, the appointees must normally be of the president's party. Washington made Jefferson secretary of state and Hamilton secretary of the treasury. But friction arose, and it soon proved desirable to bring the chief offices into the hands of men who saw eye to eye in political matters. Since 1795, the principle of party solidarity has been adhered to rather closely. To be sure, Cleveland appointed

Advisors
outside
of the
cabinet

Cabinet
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fluencing
the
selection
of mem-
bers

1. Party
status

as secretary of state a man who had been thought of as a Republican candidate for the presidency. But the appointee (Walter Q. Gresham) had supported Cleveland in the electoral campaign. McKinley appointed a "gold" Democrat secretary of the treasury; Theodore Roosevelt and Taft each appointed a Democrat secretary of war; Hoover made a Democrat attorney-general. But in all of these instances, except possibly the first, the appointee had not been prominent in national politics. The same was true of Henry L. Stimson, appointed secretary of war by Franklin D. Roosevelt in 1940; although another Republican (Frank Knox) simultaneously made secretary of the navy had only four years previously been his party's candidate for vice-president.¹ Regard for party affiliation does not mean, however, that only party leaders are appointed.² The tendency to look upon the cabinet as a council of party leaders has pretty much come to an end. The appointees normally belong to the party in power at the White House; but, as a rule, half or more of them are not party leaders in any proper sense of the term, and some have had no active part in politics at all.³

2. Other
factors

Other practical considerations more or less influencing the president's selection are geographical distribution, the representation of various wings or factions of the party, and obligations incurred for political support. It will not do to take all of the cabinet officers from the East, or from the West, or from any other single section of the country.⁴ Appointment of representatives of different elements in the president's party is designed, of course, to conciliate opposition and to promote solidarity. A good illustration is President Wilson's appointment of William Jennings Bryan as secretary of state in 1913, with a view to winning for the Administration the support of the more radical wing of the Democratic party. Selections must frequently be made, too, with a view to rewarding individuals (or groups behind them) who have aided conspicuously in the president's election. Still another powerful factor is personal friendship and favor. Every president takes into his official family men whom he knows but slightly; but he is likely to include also one or two men who, whatever other claims they may have, are first of all personal friends, e.g., Harry M. Daugherty in Harding's cabinet, Ray Lyman Wilbur in Hoover's, and William H. Woodin in Franklin D. Roosevelt's original group.⁵ All told, however, a steadily increasing proportion of cabinet officers are chosen for their special knowledge and experience

¹ When appointed secretary of agriculture in 1933, Henry A. Wallace was a registered Republican, but he had been supporting Democratic candidates since 1926. Secretary of the Interior Ickes, also, was at least of Republican antecedents.

² On the other hand, of course, members are occasionally chosen mainly or solely because of their services as party leaders or officers. Examples include the selection of Will H. Hays, Walter Brown, and James A. Farley for the postmaster-generalship by Presidents Harding, Hoover, and Franklin D. Roosevelt, respectively, whose campaigns the appointees as national committee chairmen had managed. Cf. D. G. Rowley, *The Cabinet Politician; The Postmaster-General, 1829-1909* (New York, 1943). The Senate commonly assents to the president's cabinet selections without much opposition or hesitation. But see p. 356, note 4, below.

or their administrative ability, proved or presumed. Frequently, they are persons who have attained eminence in the professional or business world. The secretary of the treasury is very likely to be of this type, as, for example, William G. McAdoo and Andrew W. Mellon; the secretaries of commerce and agriculture also, as in the instances of Herbert Hoover, David F. Houston, and Henry A. Wallace; and perhaps one may add the secretary of labor, as in the case of the first woman to receive a cabinet appointment, Frances Perkins. The attorney-general is at least always a lawyer. Rarely does a member appear, however, who has ever had any connection with the work of the department over which he is called to preside; and, contrary to earlier practice, few heads of departments are now carried over from one administration to another, even when a new president is of the same party as his predecessor.¹ For the experience, as well as the technical competence, essential to satisfactory performance of its work, a department is dependent mainly upon subordinate officers who do not come and go with changes at the White House.

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¹ Except that a vice-president succeeding to the presidency in mid-term usually continues the cabinet of his predecessor, at least for a time.

Departments for whose chiefs the president often goes farthest afield are those of War and Navy. Restriction of these posts (by unvarying usage) to civilians is likely to mean in any case that appointees will not know much about the work to be performed. "I know," said Elihu Root when made secretary of war by President McKinley, "nothing about war; I know nothing about the Army." For a survey of the more recent secretaries of war from this point of view, see P. Herring, *The Impact of War* (New York, 1941), Chap. IV. Henry L. Stimson, who headed the War Department during World War II, had at least the advantage of having previously served (under President Hoover) as secretary of state. He had also had military experience in World War I.

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CHAPTER XIX

THE PRESIDENT AS CHIEF EXECUTIVE

Whatever else he may be—guide and collaborator in legislation, party leader, general custodian of national interests—the president is first of all an executive. In defining his position as such (as head, indeed, of the executive branch), the constitution, however, falls somewhat below its customary level of clarity. In one place, it unqualifiedly vests in the president “the executive power,”¹ certainly suggesting that whatever executive power there is belongs to him. Later on, however, it separately grants him certain specific powers of an executive nature, *e.g.*, those of appointment (with the advice and consent of the Senate), treaty-making (also with the Senate’s approval), and pardon and reprieve, and people have sometimes wondered why, if *all* executive power is conferred, the constitution’s framers should have thought it necessary to provide in this way for particular powers of the kind, and whether, after all, there may be executive powers which, not being expressly granted, are to be regarded as withheld.² Another point that has troubled some students of the subject is that, while the president is charged with taking care that “the laws be faithfully executed,”³ the actual task of executing them inevitably falls mainly to other people, who, therefore, might be looked upon as sharing in a power nominally possessed by the president alone. Still again, when Congress discharges its constitutional function of making “all laws which shall be necessary and proper for carrying into execution” the powers of the national government,⁴ the question might arise whether the two houses are sharing in the executive function. Many of these laws bestow powers and duties on the president. Are these *executive* powers, and if so, how did Congress come by them if *the* executive power is lodged in the president? Or is such legislation to be regarded as merely prescribing conditions under which executive powers are to be exercised?

Some constitutional doubts and difficulties

Abstruse questions such as these are mentioned here, not for debate, but only to give some idea of how complex our system of divided government really is, and to make clear why presidential powers should so often have stirred controversy and furnished issues for adjudication in the courts. In practical fact, the sources from which presidential executive

The practical sources of executive power

¹ Art. II, § 1, cl. 1.

² Certain of the executive powers individually bestowed would no doubt have required special mention because of the connection with them assigned to the Senate. But this cannot account for the mention of others, *e.g.*, pardon, with which the Senate has nothing to do.

³ Art. II, § 3.

⁴ Art. I, § 8, cl. 18.

powers are derived are simply two: (1) constitutional clauses directly conferring them (as interpreted, when challenged, by a usually generous Supreme Court), and (2) acts of Congress passed in pursuance of the "necessary and proper" clause, or of other direct or implied authority. When, for example, Congress establishes a new executive department, a new diplomatic post, or a new administrative commission, it automatically enlarges the president's power of appointment and removal. When it passes a tariff act, such as the Smoot-Hawley Act of 1930, authorizing the president to approve or reject rates recommended by the Tariff Commission, it puts into his hands an important power over foreign commerce. When it goes farther (as in 1934, with later renewals), and authorizes the president to conclude international trade agreements independently of the Tariff Commission, and involving the modification of duties by as much as fifty per cent, it still further extends this power. When, as in the Reorganization Act of 1939, it empowers the chief executive to rearrange the administrative machinery of the national government in the interest of economy and efficiency (with only a right of disallowance reserved to Congress), it bestows significant new discretionary authority. And when, as in the Act to Promote the Defense of the United States (the crucial first Lend-Lease Act of 1941), it authorizes the president, at his sole discretion, to place war materials and supplies at the service of hard-pressed foreign powers, it confers authority of truly immense proportions.¹

The
question
of
inherent
power

A question which has stirred considerable difference of opinion, even among presidents themselves, is that of whether the president has inherent, as well as conferred, executive power. That is, has he power, outside of the constitution and laws, simply because he is the chief executive? Alexander Hamilton and Andrew Jackson thought so; on one occasion, the Supreme Court inclined to the same view;² and Theodore Roosevelt, after going out of office, recorded that as president he had "insisted upon the theory that the executive power was limited only by specific restrictions and prohibitions . . .," and that he had "declined to adopt the view that what was imperatively necessary for the nation could not be done by the president unless he could find some specific authorization to do it."³ The basic characteristic of our national government is, however, that it is a government of limited powers—of only such powers as are enumerated in the constitution or can properly be inferred from it, which clearly means that no executive power (or power of any other sort) is inherent, in the sense of antedating and transcending the constitution. "The true view of the executive function is, as I conceive it," wrote President Taft, "that the president can exercise no power which cannot

¹ On the delegation of vast powers to the president in wartime, see pp. 665-666 below.

² *In re Neagle*, 135 U. S. 1 (1890). See W. H. Taft, *Our Chief Magistrate and His Powers*, 88-91.

³ *Autobiography* (New York, 1913), 383-389.

be reasonably and fairly traced to some specific grant of power or justly implied or included within such express grant as necessary and proper to its exercise. Such specific grant must be either in the constitution or in an act of Congress passed in pursuance thereof. There is no undefined residuum of power which he can exercise because it seems to him to be in the public interest."¹ President Roosevelt was politically-minded, President Taft legally-minded; and the view of the latter seems clearly the more correct—even though at various times in the past the Supreme Court has gone far toward conceding to the president full independence in interpreting his constitutional powers, and in that qualified sense has sometimes been said to have recognized the chief executive as having "inherent" powers.²

However this may be, the growth of presidential power has been one of the outstanding developments of our governmental system in the past hundred years. The point will not be elaborated further until after various major presidential functions shall have been brought to view one by one. But the remark may be ventured that, even *before* President Franklin D. Roosevelt was clothed by Congress with extraordinary authority for dealing with the national emergencies produced by economic depression and international conflagration, the president had become—European dictators apart—the most powerful executive officer in the world. Of the three branches into which our national government is divided, the executive has advanced farthest from the point at which it started. The judiciary has considerably more than held its own—mainly because of its power to review legislative and executive acts. The legislative branch has run a poor third; and for this the remarkable development of the presidency has been primarily responsible.

Viewed in the large, the president's powers and functions, as conferred in the constitution and laws, fall into two general groups: (1) those that are mainly or wholly executive, and (2) those that involve sharing in the work of legislation. Unknown to the constitution and laws, although of course related to these two categories (especially the second) in actual practice, is a third set of functions, *i.e.*, those arising from the president's position as principal leader of his party. Executive powers, in turn, fall into six principal groups: (1) enforcement of the laws and maintenance of domestic order; (2) appointment and removal of civil

Presi-
dential
powers
classified

¹ *Our Chief Magistrate and His Powers*, 139-142.

² Curiously, the rôle played by Taft as chief justice in later days, notably in the Myers case (see p. 359 below), contributed to promoting this view. In the case of *United States v. Curtiss-Wright Export Corporation*, 299 U. S. 304 (1936), the Supreme Court said that if the power to conduct foreign relations had not been conferred in the constitution, the national government would have possessed it anyway; and since the conduct of foreign relations is by nature an executive function, this assertion of the Court has sometimes been construed as tantamount to attributing at least potential inherent power to the president. Actually, of course, the president's authority to manage the country's foreign relations has to rest on no such inferential basis, for it is expressly conferred.

³ On the general subject of conceptions of the presidential office, see E. S. Corwin, *The President: Office and Powers*, Chap. v.

and military officers; (3) supreme direction of administration, including the function of issuing orders and regulations; (4) pardon, reprieve, and amnesty; (5) management of foreign relations; and (6) control of the military and naval establishments, together with the conduct of war. The last two of these will necessarily be dealt with in later chapters devoted to foreign relations and defense;¹ the other four must engage our attention here.²

1. *Enforcement of the Laws and Maintenance of Order*

Execution
of
the laws

The prime duty of any executive is, of course, to *execute*; and the most solemn obligation that the constitution imposes on the president is to "take care that the laws be faithfully executed." The oath of office which he takes requires him to "protect and defend" the highest law of all, *i.e.*, the constitution; and the general nature of his position makes it his function not only to enforce all federal laws (including treaties), but also to protect all federal instrumentalities and property. Normally, he does these things by quiet, and even routine, supervision and direction of the administrative machinery which the laws have provided for the purpose, including, as becomes necessary, the Department of Justice, the federal district attorneys, the United States marshals, and the federal courts.³ But if need arises, he may make full use of the Army and Navy, and likewise of the National Guard when called, according to act of Congress, into federal service. "The entire strength of the nation," the Supreme Court has said, "may be used to enforce in any part of the land the full and free exercise of all national powers and the security of all rights intrusted by the constitution to its care. . . . If the emergency arises, the army of the nation, and all its militia, are at the service of the nation to compel obedience to its laws."⁴ Congress has passed numerous measures authorizing the use of both the national and state

¹ Chaps. xxxiii-xxxv below.

² Legislative and party functions are considered in Chap. xx below.

³ In cases of suspected violation of federal law, he will ordinarily instruct the attorney-general, as head of the principal law-enforcing agency, to start appropriate action. It goes without saying, however, that the vast bulk of governmental work, including law enforcement, goes on year in and year out through the constituted channels with no personal intervention or notice from the president. Enforcement of law, it may be added, entails likewise the interpretation of law; that is to say, the enforcing authority must continually be deciding what the law means and to what extent it is applicable in given situations. Questions that provoke sufficient differences of opinion are, of course, likely to reach the Supreme Court, which becomes the final arbiter. "All executive readings of the laws are . . . when they give rise to litigation, subject to review by the courts." E. S. Corwin, *The President: Office and Powers*, 112. Closely related is the executive power to issue proclamations, orders, ordinances, rules, and regulations supplementing the laws as they come from Congress—a function considered at a later point in this chapter (see pp. 362-366 below).

⁴ *In re Debs*, 158 U. S. 564 (1895). Laxity in law enforcement (federal, state, and local)—long a matter of reproach, but aggravated by the difficulty of carrying out the statutes enacted in pursuance of the Eighteenth Amendment—led President Hoover, in 1929, to appoint a fact-finding commission on law observance and enforcement. The Wickersham Commission's report was published in several installments in 1931.

forces in law enforcement¹—even though, so far as the Army and Navy are concerned, the president would have the power in any case.

As we have seen, the constitution stipulates that the United States shall guarantee to every state a republican form of government, and shall protect the states against both invasion and domestic violence. If the republican form of government in a state is threatened or danger of an invasion arises, the president acts without awaiting a request from the state authorities. If the situation involves merely domestic disorder, he cannot act until he is asked to do so, unless the execution of national law, the carrying on of a national activity, or the safety of national property is imperiled; in this contingency, he may intervene independently, as did President Cleveland, over the protest of the governor of Illinois, when, in 1894, the carrying of the mails and the flow of interstate commerce were obstructed by a great railway strike at Chicago.² A request for national assistance in repressing domestic violence is made by the legislature of the state if it is in session, otherwise by the governor. The president is not under compulsion to comply; indeed, he is not likely to do so unless, after investigation, he considers that the authorities of the state have reached the limit of their capacity to handle the situation. When first asked by Governor Cornwell to aid West Virginia in curbing disorders produced in that state by protracted strikes of bituminous coal miners in 1921, President Harding refused, although later developments led him to take the desired action.³

Suppression of domestic disorder

¹ The series began with (1) a militia act of 1792, which authorized the president to call forth the militia whenever the execution of the federal laws was obstructed by combinations too powerful to be suppressed through the ordinary course of judicial proceedings, and (2) an act of 1807, which authorized the use of the Army and Navy under similar circumstances.

² Governor Altgeld protested against the use of national troops in the state unless he or the legislature requested it. But the President stood firmly on his right and duty to execute the national laws with all the forces at his command, and in the Debs case previously cited his position was sustained unanimously by the Supreme Court, on the ground that it was justified by interference by the strikers with the free flow of interstate commerce and with the transportation of the mails. See Cleveland's own account of the affair in his *Presidential Problems* (New York, 1904), Chap. II. Cf. B. M. Rich, *The Presidents and Civil Disorder* (Washington, 1941), Chap. VI; A. Lindsey, *The Pullman Strike* (Chicago, 1943); W. R. Browne, *Altgeld of Illinois* (New York, 1924), Chaps. xii-xvi; A. Nevins, *Grover Cleveland; A Study in Courage* (New York, 1932), Chap. xxxiii.

³ A race riot in Detroit in June, 1943, led President Roosevelt to issue a proclamation calling upon the rioters to "disperse and retire peaceably to their respective abodes"; and when the governor of the state, having imposed a modified form of martial law on the Detroit metropolitan area, requested the aid of federal troops, some six thousand were moved in as a means of restoring order. The state was the more helpless in the situation, of course, because its National Guard units had been called into wartime federal service. See E. Brown, "The Truth About the Detroit Riot," *Harper's Mag.*, CLXXXVII, 488-498 (Nov., 1943). At various times during the present war, the President ordered striking coal miners to return to their jobs, and more than once the national government temporarily took over and operated some or all bituminous and anthracite mines. Labor troubles caused certain industrial plants, merchandising establishments (e.g., the headquarters and branch stores of Montgomery Ward and Co.), and transportation systems, (e.g., the facilities of the Philadelphia Transportation Company) to be taken over briefly also. These actions were aimed not so much, however, at curbing disorder as at averting interference with the national war effort.

2. *Appointment and Removal*

Except for the members of Congress, only two officials connected with the national government are elected by the people, namely, the president and the vice-president. All others are appointed.¹ The power to appoint is vested basically in the president, and notwithstanding that in exercising it he acts under a number of restraints, no authority intrusted to him is, year in and year out, of greater practical importance. With it goes not only control over the work of administration in its larger aspects, but also weighty influence upon legislation as a result of the conferment, or withholding, of offices sought by importunate senators and congressmen for their constituents. A president's appointments may go far toward making or breaking him as head both of the government and of his own party.

Restric-
tions
upon the
appoint-
ing
power.

1. Advice
and con-
sent of
the
Senate

Fateful as the power is, however, far-reaching restrictions hedge it about. To begin with, by constitutional provision, the president appoints, not independently (except under certain circumstances indicated below), but "by and with the advice and consent of the senate;" to speak with complete accuracy, he *nominates*, the Senate confirms (by a majority vote of the members present),² and he thereupon appoints. As was explained by Hamilton in *The Federalist*, this arrangement was adopted, not to relieve the president of responsibility for appointments, but to check any spirit of favoritism that he might display and to prevent the appointment of "unfit characters from state prejudice, from family connection, from personal attachment, or from a view to popularity."³

It long ago became customary for the Senate to assent almost as a matter of course to the president's selections for the highest positions in the executive departments. The heads of departments serve, at least ostensibly, as his principal advisers; besides, as the chief of the executive branch, he bears full responsibility for their official acts. On both grounds, it is only fair that in choosing them he shall normally have complete freedom; and only six nominees for such posts have ever been rejected.⁴ Nominations to judgeships and diplomatic positions have been refused assent—or at all events strongly opposed—with somewhat increased fre-

¹ Strict accuracy requires it to be noted, however, that each house of Congress chooses its own officers, except that the vice-president of the United States is *ex officio* president of the Senate.

² Confirmation or rejection must be absolute, without any conditions attached.

³ No. LXXVI (Lodge's ed., 474).

⁴ R. B. Taney, for secretary of the treasury, in 1834; Caleb Cushing, for secretary of the treasury, in 1843; David Henshaw, for secretary of the navy, in 1844; J. M. Porter, for secretary of war, in 1844; Henry Stanberry, for attorney-general, in 1868; and Charles B. Warren, for attorney-general (rejected twice), in 1925. Occasionally, however, nominees are confirmed only over considerable opposition. Thus a Democratic Senate, in 1940, divided on confirming Henry L. Stimson as secretary of war and Frank Knox as secretary of the navy (both being Republicans) by votes of 56 to 28 and 66 to 16, respectively; and early in 1945—even after the post had been stripped of important financial powers which a Senate majority did not want to see intrusted to him—Henry A. Wallace was confirmed as secretary of commerce only by a vote of 56 to 32.

quency in later decades, yet as a rule are not seriously challenged. In other fields and on lower levels, the power to confirm or reject is employed freely; and the president must be prepared, in case one nomination fails, to offer another or to see the office involved stand vacant for a time. The number of senatorial rejections naturally varies with circumstances. If the president and Senate are on good terms, and especially if the president's party enjoys the advantage of a loyal senatorial majority, nominations are likely to be approved almost automatically.¹ If, however, there is lack of harmony, rejections or refusals to act will be relatively numerous.²

A second limitation upon the president's power of appointment arises from authority given Congress by the constitution to vest the appointment of such "inferior officers" as it thinks proper, not only in the president alone, but in the courts of law, or in the heads of departments.³ The constitution nowhere defines the term "officer," nor does it say who are to be considered "inferior officers"; and no very clear definitions have established themselves in practice. About all that can be said is that the constitution requires certain kinds of officers—ambassadors, other public ministers and consuls, and judges of the Supreme Court—to be appointed by the president and Senate, and that outside of this small group it is for Congress to say who are "inferior officers" and to provide, if it likes, for appointment of them by any one of the three special agencies named. This power has been exercised repeatedly: the president has been given sole control over some miscellaneous appointments, although no large number; the courts have been authorized to select their own clerks; and the heads of departments have been empowered to designate large numbers of subordinates, commonly nowadays in accordance with civil service regulations to be described in a later chapter. How far this dispersion of the appointing power has gone is indicated by the fact that, in a total of more than a million officers and employees of all grades in the national civil service before the present war, only some 16,000 were put in their positions by the president and Senate.⁴ The proportion is smaller than

2. Appointment of inferior officers by courts and heads of departments

¹ As, for example, during the second session of the Seventy-eighth Congress (January 10-December 19, 1944), when of 10,119 nominations to civil and military posts submitted to the Senate, 10,073 were confirmed, four were rejected, eighteen were withdrawn, and twenty-four were not acted upon.

² A. W. Macmahon, "Senatorial Confirmation," *Pub. Admin. Rev.*, III, 281-296 (Autumn, 1943).

³ During a recess of the Senate, the president may make temporary, or "recess," appointments to positions requiring confirmation. These lapse at the end of the Senate's next session unless confirmed, although there is nothing except considerations of expediency to prevent reappointment of the same man the moment the Senate adjourns. Against persistent Senate opposition, Theodore Roosevelt in this way kept a Negro in the office of collector of customs at the port of Charleston from 1902 to 1904.

⁴ Art. II, § 2, cl. 2.

⁵ Many military offices, to be sure, are filled in this way. If the Senate should meet with success in its drive of recent years for wider participation in the appointment of civil officials—as, for example, through enactment of something in the nature of the perennial McKellar Bill—this number would be materially increased. See pp. 429-430 below.

most people realize; and since 1938 one important group, *i.e.*, postmasters of the first, second, and third classes, although still appointed by president and Senate, has been included in the classified civil service, rendering presidential selection hardly more than a formality. Nevertheless, burdened as he is with multifold other tasks, the chief executive is still charged with more appointments than he ought to be called upon to make.

3. "Senatorial courtesy"

In making appointments, the president is limited by further conditions of a highly practical nature. He cannot simply pick men for thousands of posts "out of the air," so to speak. Rather, he must depend upon other people to bring candidates to his attention and to make clear their claims to selection; and this opens a way for the great majority of presidential appointees actually to be chosen by senators or representatives belonging to the president's party—the principal rôle being played by senators, yet with representatives often making proposals in the case of federal officials operating entirely within a congressional district, or indeed in the case of more important ones when the state has no senator belonging to the president's party.¹ Nominations so originating are more than likely to receive senatorial confirmation. Any originating otherwise are likely to be confirmed, also, if no dissent is expressed by either or both of the senators from the state in which the officer is to function. If, however, such objection is voiced, "senatorial courtesy" generally comes into play, forbidding the member's wishes to be flouted by his colleagues—in other words, dictating that the nomination be rejected.² In addition to reckoning with this senatorial practice, the president frequently finds himself virtually obliged to make appointments aimed principally at placating a wing of his party, meeting a demand from a particular section of the country, or keeping some influential politician in line. Small wonder that every chief executive finds his appointing power—in other words, his patronage—one of his greatest burdens! Every time he appoints to an office, President Taft used to say, he makes nine enemies and one ingrate. The worst of it is that, under the pressures described, many poor appointments result.

Removals: the question of concurrence by the Senate

The constitution makes all civil officers of the United States liable to removal by impeachment, but only upon conviction of treason, bribery, or other high crimes and misdemeanors. Obviously, there must be removals for incompetency, neglect, and other reasons which have no relation to the specified grounds for impeachment; and the question of how such removals should be made forced itself upon the attention of Congress almost

¹ A prominent senator (Hatch) observed in the course of debate in 1943 that when appointments have to be confirmed by the Senate, senators from the states affected actually make them, leaving the president with only a veto power. "The right to reject, which the constitution vests in the Senate, has become the right to select."

² Another form of senatorial courtesy appears when, the president having nominated a senator to an office, the Senate confirms the nomination immediately and without referring it to any committee. Departure from this practice in the case of the nomination of Hugo L. Black to an associate justiceship in 1937 stirred much interest and controversy. See K. Cole, "Mr. Justice Black and 'Senatorial Courtesy,'" *Amer. Polik. Sci. Rev.*, XXXI, 1113-1115 (Dec., 1937).

immediately after the new government under the constitution was set up. Two opposing views appeared. One was that, since the constitution was silent on the subject (except as to impeachment), the power to remove was to be regarded as implied in the power to appoint, and therefore should be exercised by the same authorities that were associated in making appointments—which in the case of “presidential” offices would mean the president and Senate. Alexander Hamilton was strongly of this opinion; and, in earlier days even the Supreme Court seemed to agree with him. The other view was that, since the president was to be directly responsible for the efficiency of all national administration, it would be unfair to tie his hands by requiring the Senate’s consent to removals. Madison argued convincingly for this opinion, and it finally won general acceptance.

For three-quarters of a century, the matter seemed settled. In 1867, however, it was reopened dramatically when Congress, inspired by hostility to President Johnson, passed over his veto a Tenure of Office Act providing that, while the president might *suspend* a civil officer when the Senate was not in session (and therefore unable to act on the case), he should definitely *remove* no such officer, if appointed with the advice and consent of the Senate, except with the approval of that body. To be sure, this startling measure was repealed in part in 1869 and completely in 1887. To be sure, too, most people believed, with Johnson, that it was unconstitutional. Before it disappeared from the statute-book, however, an act passed in 1876 reaffirmed the disputed principle by providing that postmasters of the first, second, and third classes should be appointed, and might be *removed*, by the president by and with the advice and consent of the Senate, and should hold their offices for four years unless sooner removed or suspended according to law. Notwithstanding doubts, therefore, it seemed that, while normally the president could make removals freely and without consulting the Senate, Congress could go as far as it liked in prescribing exceptions.

The famous Tenure of Office Act of 1867 never, while still in force, came before the courts in such a way as to lead to a decision upon its validity; and the statute of 1876 likewise ran for fifty years without effective challenge. In 1920, however, President Wilson, without consulting the Senate, removed Frank S. Myers, first-class postmaster at Portland, Oregon, whom he had appointed in 1917; and when, Myers himself having died in the meantime, the administratrix of his estate carried to the Supreme Court a suit for the salary lost through removal, that tribunal held that in so far as the act of 1876 attempted to place restriction upon the power of the president to remove officers appointed by him with the consent of the Senate, it was unconstitutional.¹ This meant that the

The
Myers
case
(1926)

¹ Myers v. United States, 272 U.S. 52 (1926). Up to now, the Supreme Court had always succeeded in side-stepping any ruling on the nature and location of the removal power. Incidentally, this was the first time in history that the United States Government, through the Department of Justice, appeared in the Supreme Court to

removal of Myers, without the matter being referred to the Senate, was constitutionally and legally proper, and that, after all, it is not within the power of Congress to limit the president's discretion by making removals contingent upon senatorial assent.¹

No one, of course, ever argued that the president's power of removal is absolutely unlimited. By express constitutional provision, federal judges (except in the territories and dependencies) hold office during good behavior; and this is construed to mean that they can be removed only by impeachment.² Furthermore, officials who secure appointment under the merit system (usually directly or indirectly from heads of departments representing the president) are removable only "for such causes as will promote the efficiency of the service," even though, in practice, this restraining clause is so elastic as to permit the appointing officer to remove almost any merit appointee for insufficient reason as well as otherwise.³

But, beyond this, can any restraints be imposed? Until a decade ago, the outcome of the Myers case would presumably have dictated an answer in the negative. In 1935, however, the matter was given a new slant by another weighty Supreme Court decision. This time the official removed was William E. Humphrey, a Republican member of the Federal Trade Commission (originally appointed by President Coolidge), who, because of not seeing eye to eye with President Roosevelt upon questions of public policy, was asked in 1933 to hand in his resignation, and, upon refusing to do so, was summarily ejected from office. Once more, a suit for recovery of lost salary was carried to the highest court by an executor; and this time the case was won.⁴ In writing the Myers decision, Chief Justice Taft had voiced the *dictum* that the considerations which debarred Congress from interfering with the president's power to remove an executive officer, such as the Portland postmaster, applied equally to removals from independent regulatory commissions, even though performing quasi-legislative or quasi-judicial, rather than truly executive, functions. The Court now, however—doubtless to Mr. Roosevelt's con-

The
Humphrey
case
(1935)

attack the constitutionality of an act of Congress. In the course of its decision, too, the Court vindicated President Johnson's veto of the famous statute of 1867 by pronouncing that measure unconstitutional *post mortem*.

¹ E. S. Corwin, "Tenure of Office and the Removal Power Under the Constitution," *Columbia Law Rev.*, XXVII, 353-399 (Apr., 1927); H. L. McBain, "Consequences of the President's Unlimited Power of Removal," *Polit. Sci. Quar.*, XLI, 596-603 (Dec., 1928); J. Hart, "The Bearing of Myers v. U.S. upon the Independence of Federal Administrative Tribunals," *Amer. Polit. Sci. Rev.*, XXIII, 657-673 (Aug., 1929), and reply by A. Langeluttig, *ibid.*, XXIV, 57-66 (Feb., 1930). The briefs, oral arguments of counsel, and opinions of the Court in the Myers case will be found in 69th Cong., 2nd Sess., Sen. Doc. No. 174 (1926).

² During a period of bitter partisan conflict (in 1801), sixteen judges of circuit courts established by a "lame-duck" Federalist Congress were ousted by having their posts abolished at the hands of a Republican Congress. But of course these were not removals in the ordinary sense; and the action was that of Congress, not of either the president and Senate or the president alone.

³ See p. 437 below.

⁴ *Rathbun [Humphrey's executor] v. United States*, 295 U.S. 602 (1935). On the same day, the Court administered another blow to the President by holding the National Industrial Recovery Act unconstitutional. See p. 555 below.

sternation—unanimously held otherwise. When establishing the Federal Trade Commission,¹ Congress had given the members seven-year terms and had made them removable by the president only for "inefficiency, neglect of duty, or malfeasance in office." No charge on any of these grounds had been brought against Mr. Humphrey; his removal—which he protested vigorously until his death shortly afterwards—was based solely and frankly upon the President's dislike of his views; and on that account the Court found it unlawful. The right to remove a purely executive officer, it said in substance, derives from the inherent nature of the executive power, and under our system of separation of powers is protected against congressional interference. But the Federal Trade Commission is a non-partisan and essentially non-executive agency set up by Congress to carry specified congressional enactments into effect, and the same principle of separation of powers forbids the president to remove its members for reasons other than those which Congress, in the proper exercise of its legislative authority, has prescribed. The decision was of no avail to the now deceased commissioner, but it placed a new and desirable limitation upon the presidential removal power. Thenceforth, members of the numerous great independent regulatory commissions were presumed to be secure against dismissal for reasons of a "political" character.²

If the Senate cannot legally prevent a removal (except in so far as the

¹ See p. 552 below.

² Professor Corwin sums up the situation since 1935 as follows: "(1) As to agents of his own powers, the president's removal power is illimitable; (2) as to agents of Congress's constitutional powers, Congress may confine it to removal for cause, which implies the further right to require a hearing as a part of the procedure of the removal." *The President: Office and Powers*, 96. For full discussion of the Humphrey case, see W. J. Donovan and R. R. Irvine, "The President's Power to Remove Members of Administrative Agencies," *Cornell Law Quar.*, XXI, 215-248 (Feb., 1936). In 1937, President Roosevelt sponsored a reorganization measure which would have given the chief executive power to make such removals as that attempted in the case of Humphrey, but Congress flatly refused to pass it.

The removal of Dr. A. E. Morgan, in 1938, as chairman of the Tennessee Valley Authority, because of his refusal to produce evidence in support of charges which he had made against his fellow-directors, presented a different angle. The T.V.A. is not strictly a "regulatory commission," but more properly a business enterprise. Besides, Congress had given the president authority to remove, even if not for precisely the reason for which the removal was actually made. Hence, when Dr. Morgan contested his removal, the Supreme Court refused to support him. *Morgan v. United States*, 304 U. S. 1 (1938).

The subject should not be dismissed without observing that Congress, on its part, can (as in the case of the judges in 1801) separate officials from their posts by abolishing the posts themselves. Thus when, in 1943, provision was made for liquidating the National Youth Administration, persons engaged in managing that service were legislated out of jobs unless others could be found for them. Congress, indeed, may grow more personal and attempt to force particular individuals out of federal employment, as when, in 1943, a rider attached to a deficiency appropriation measure stipulated that three officials named (Robert M. Lovett, government secretary of the Virgin Islands and Goodwin B. Watson and William E. Dodd, Jr., of the Federal Communications Commission) should not continue on the federal payroll beyond a prescribed date unless renominated by the president and reconfirmed by the Senate. At the White House, the rider, although necessarily accepted with the bill, was properly condemned as to all intents and purposes a bill of attainder. See F. L. Schuman, "Bill of Attainder in the Seventy-eighth Congress," *Amer. Polit. Sci. Rev.*, XXXVII, 819-829 (Oct., 1943).

The
Senate
cannot
force a
removal

principle of the Humphrey case is applicable), it also cannot compel one to be made. This principle—never really doubted by any constitutional lawyer—received forceful illustration in February, 1924, when the Senate called upon President Coolidge to ask for the resignation of his secretary of the navy, on the ground that the latter had been remiss in the performance of his official duties. Affirming that "the dismissal of an officer of the government, such as is involved in this case, other than by impeachment, is exclusively an executive function," the President explained in a public statement that no official recognition could be given the resolution; and legal opinion and popular sentiment alike strongly supported the position taken.¹

3. *Direction of Administration—Issuing Orders and Regulations*

Quite as important as the president's authority to appoint and remove officials is his power to direct them in performing their duties. As exercised today, this power is the outcome of long and somewhat hazardous development. The idea of the founders was that the control of executive and administrative work should be divided between the president and Congress; and when the first executive departments were established, it was specified that the former should have power to direct two of them, i.e., State and War, but that the head of the third, i.e., the Treasury, should report directly to Congress. The earlier presidents used their directing power sparingly, and the courts viewed it as substantially limited to the fields in which it was specifically conferred.

Diffusion
of con-
trol over
adminis-
tration

Notwithstanding the spectacular growth of executive power in these later days, Congress still wields a great deal of control over the administrative mechanisms and operations of the government. It is Congress that creates the executive departments and, as a rule, their more important subdivisions—the independent establishments, too—and determines what their functions shall be. It is Congress that says, in many situations, what

¹ Another angle of the relations of president and Senate in the matter of appointments and removals was presented in 1931, when the Senate, after confirming three persons nominated by the president for membership in the reorganized Federal Power Commission, changed its mind and by a vote of 44 to 37 attempted to recall the confirmation. President Hoover took the position that the confirmations represented completed acts, that the commissioners were duly in office, and that the only way—aside from removal by the president—in which they could be ousted was by impeachment. "I cannot admit the power of the Senate," he asserted, "to encroach upon the executive function by removal of a duly appointed executive officer under the guise of reconsideration of his nomination." The Senate's answer was to order the names restored to the executive calendar; and although when the question of confirmation was brought up again, two of the three were endorsed by narrow margins, that of the third, George Otis Smith, was rejected. Backed by the President, Smith was already at work as chairman, and the Senate's next move took the form of *quo warrant* proceedings to test his right to continue. The outcome was a decision by the Supreme Court unanimously upholding the President's contention and denying the Senate's right to recall the confirmation of a nominee, once the latter's commission has been issued by the president. *United States v. Smith*, 286 U. S. 6 (1932). In 1939, President Franklin D. Roosevelt refused to accede to a request of the Senate that he return its resolution assenting to a given appointment to a district judgeship in Tennessee.

shall be done and—in so far as it likes—how it shall be done.¹ Congress alone can provide the requisite funds, and it can investigate, criticize, and suspend or permanently stop many, if not most, kinds of administrative activity, regardless of the wishes of the president and his administrative associates. Moreover, many lines of responsibility and control run directly from administrative agencies to Congress, with in fact “a maze of criss-crossing relationships between the president, Congress, and the departments, independent commissions, public corporations, and other agencies composing the federal establishment.”² Nevertheless, Congress does not, and cannot, itself *administer*; day in and day out, it is the president—personally or through his higher subordinates—that exercises immediate, continuous direction and control; and Congress not only accepts this fact, as it must, but steadily contributes to exalting the executive power of direction by providing new governmental machinery to be operated by the president, and by assigning all manner of directive duties and tasks to him. ✓

In point of fact, the directing power is one which must have developed in a large way in any case. Not only does the power to remove necessarily involve the power to direct,³ but the latter power has a clear constitutional basis in the injunction that the president shall “take care that the laws be faithfully executed,” and in his inaugural pledge that he will “faithfully execute” the office of president and “preserve, protect, and defend the constitution.” His foremost duty, indeed, is to see that the laws are enforced—not only the acts of Congress, but treaties, decisions of the federal courts, and all other national instruments having back of them the authority of the constitution; and to this end he must be regarded as endowed with power to direct his administrative subordinates, even as he is authorized to use the armed forces if such a course becomes necessary. Acts required by law of heads of departments and other executive officers, *i.e.*, acts which are “ministerial” in character rather than political, are, indeed, theoretically outside of the president’s jurisdiction; in case of neglect, there are recognized judicial procedures

Basis
and
extent
of the
power of
direction

¹ As a recent writer has remarked, it is a common error to picture the lines of administrative control and of responsibility as uniformly running vertically from subordinate to superior up through agency channels converging in the chief executive as the top of the hierarchy. In the large, they do this. But the complete picture is far from being so simple—which, of course, is only one more illustration of the artificiality of our vaunted theory of separation of powers. See P. Herring, “Executive-Legislative Responsibilities,” *Amer. Polit. Sci. Rev.*, XXXVIII, 1159 (Dec., 1944). Cf. L. D. White, “Congressional Control of the Public Service,” *Amer. Polit. Sci. Rev.*, XXIX, 1-11 (Feb., 1945).

² This was illustrated clearly when President Jackson ordered the deposits of government funds in the United States Bank to be withdrawn, and ousted two secretaries of the treasury before obtaining one who would give the necessary instructions. Armed with the power of removal, he could reiterate his command any number of times, until some one was found to obey it. The incident was important, because if Jackson had yielded, a precedent would have been established which, if followed, would have made it possible for the departments to carry on their work without full responsibility to the president. We should then have seen a situation somewhat like that existing in the states, where the governor usually has but little control over the other principal officials.

for compelling performance of them. Nevertheless, even here the president may assert himself; he may, in fact, go so far as to threaten removal of an officer for performing an act required of him by Congress, thereby forcing upon him a disagreeable choice between prosecution at law and loss of his position.¹⁰

The
power
to issue
orders

Closely related to the power of direction is the power to issue commands and regulations in the form of executive orders. The nature and scope of the government's multifarious activities are defined, at least broadly, in the constitution and in acts of Congress, but the details of organization, the forms of procedure, and, in general, the *minutiae* of administration are, and must be, left to be worked out and put into effect by those who stand closer to the work to be done. Thus, an immigration law, in seeking to debar paupers and criminals from admission to the country, will declare general policy and may specify rather fully the means and manner by which the policy is to be carried out, yet it will remain for the executive branch of the government to prescribe most or all of the detailed regulations covering the work of inspection, the handling of appeals from the decisions of the examining authorities, the detention of applicants refused admission, and similar matters; and such regulations are normally to be regarded as having the full force of law. Most of this "subordinate," or "administrative," legislation emanates from the heads of departments, or even from their inferiors. But a considerable amount comes also from the president, who in addition is, of course, ultimately responsible for all regulations and orders issued in the departments and many other establishments. The president himself promulgates the Consular Regulations and the Civil Service Rules, together with rules for the Patent Office and the customs and internal revenue services. In some cases, he acts by virtue of powers inherent in his constitutional position, *e.g.*, as commander-in-chief of the armed forces; in other instances, *e.g.*, in fixing the duties to be paid on imported goods under our trade agreement legislation, he acts by express statutory authority; in still others, he proceeds on the basis of powers inferred from the nature or tone of the law to be executed.

The con-
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Of course, there is the principle of separation of powers to be reckoned with. As traditionally interpreted, legislation is the function of Congress. Yet many executive orders have the appearance, nature, and force of law; and when their sole warrant is to be found in acts of Congress, they raise the question whether Congress has not, in effect, handed over some of its legislative authority to be exercised by the executive—a thing which numerous judicial decisions deny it the right to do. To be sure, the Supreme Court has many times taken refuge in the position that in conferring ordinance-making powers Congress is not violating the principle of separation, for the reason that what is delegated is not lawmaking power, but only authority to "fill in the details" of legislative policy already laid down by the legislative branch. There came

a time, however, when the Court, as then constituted, felt it necessary to call a halt. In 1933, the country was in the throes of an economic depression that had assumed the proportions of a national calamity. In the nature of things, Congress could not intelligently do more (even if there had been time) than enact skeleton statutes sketching the broad outlines of a recovery program. The Roosevelt Administration had come into office with such a program (at least the initial features of one) and commanded congressional majorities, fresh from the people in the case of the House, adequate to obtain virtually anything that it asked, especially with the national mood as it then was. The upshot was a swift succession of boldly conceived statutes, each developing a line of policy in the large, but also committing to the president, or to some administrative agency under his direction, sweeping authority to give effect to the policy declared by promulgating rules and regulations, or indeed, in many instances, by making choices of grave import as between alternative devices and procedures. The National Industrial Recovery Act and the first Agricultural Adjustment Act were drawn in this manner. So was the Economy Act, giving the president wide powers to reduce federal salaries and pensions at his discretion. So likewise the Emergency Farm Loan Mortgage Act, with its currency inflation section authorizing the president (among other extraordinary things) to bring about the issuance of new paper currency up to three billion dollars and to reduce the gold content of the dollar by as much as fifty per cent. In cases such as those last mentioned, the president was not *required* to act, and if he acted, he could stop at any point short of the limits fixed in the statute. But therein lay the legislation's significance: the discretionary authority conferred outdistanced that which even Congress itself would have expected to exercise in normal times.

From the days when the great recovery statutes were passed, however, grave doubt existed in many quarters as to whether the old formula about "filling in details" could possibly be stretched to cover them and the actions taken under them; and in memorable decisions handed down in 1935-36 the Supreme Court held that the unprecedentedly broad delegations attempted, notably in the National Industrial Recovery Act, exceeded all justifiable constitutional bounds.¹ As a result, the delegation of regulatory power to the executive suffered a set-back, and with it, the power to issue orders having the force of law. In the end, however, the reversal proved more apparent than real. Several of the measures invalidated were transformed by Congress into acts so phrased that later tests were successfully withstood. Death or retirement of Supreme Court

The outlook

¹ In *Panama Refining Company v. Ryan* (293 U.S. 388), only one member of the Court dissented; in *Schechter v. United States* (295 U.S. 495), the decision was unanimous; in *United States v. Butler* (297 U.S. 1), the Court divided six to three. The first two cases arose out of the Recovery Act, the third out of the Agricultural Adjustment Act. A well-reasoned explanation and defense of the discretionary provisions of the acts in question will be found in J. Dickinson, "Political Aspects of the New Deal," *Amer. Polit. Sci. Rev.*, XXVIII, 197-209 (Apr., 1934).

justices opened a way for appointment of others disposed to look more tolerantly upon the expansion of executive regulatory power. The tightening of the international situation led, in 1940, to the launching of a stupendous program of national defense, inviting legislation conferring upon the executive wide discretionary authority. And when, in December, 1941, the country was plunged into war—a situation that in any event would have magnified executive authority—sweeping powers of regulation by executive order (carried over in part from the first World War) found expression in a multitude of controls which no American who has lived through these recent years needs to have described.¹ From all indications, presidential ordinance-power, judicially curbed only in more extreme cases of congressional delegation, will still be found at a high level long after the ways of peace are resumed.²

4. *Pardon, Reprieve, and Amnesty*

Finally (with foreign relations and war powers reserved for discussion in later chapters) there is the president's power, as chief executive, to grant pardons and reprieves.³ The effect of a full pardon, the Supreme Court has said, is to make the offender, in the eye of the law, "as innocent as if he had never committed the offense."⁴ A reprieve, of course, is only a postponement of the execution of a sentence. In wielding the pardoning power, the president acts in complete independence of Congress and of the courts; it is for him alone to say who shall be pardoned, at what time, and under what circumstances, subject only to two constitutional limitations: (1) he cannot pardon a person who has been convicted by impeachment and thus restore him to office, and (2) he can pardon only in cases in which the offense has been against the authority of the United States as distinguished from that of a state. An application in behalf of a convicted person may have any one of several results: (1) full and unconditional pardon; (2) pardon qualified by conditions, and revocable if the beneficiary fails to live up to them; (3) parole without pardon; (4) commutation of sentence, having the effect of shortening a period of imprisonment, substituting a fine for imprisonment, substituting life

¹ On presidential powers in wartime, see, however, pp. 664-670 below.

² Congress itself may, of course, recall a delegated power, or may revoke an order issued, in its judgment, in abuse of any such power. Thus an act of 1943 raising the national debt limit contained a rider repealing an order by which President Roosevelt, under alleged authority of a recent Anti-Inflation Act, had undertaken to limit salaries to \$25,000 after tax deductions.

The principal treatise on the power to issue orders is that by J. Hart, cited on p. 367 below. Formerly, much inconvenience arose from the lack of any provision for systematic assembling and publication of current executive orders and administrative regulations. The defect, however, was remedied in 1936 by the establishment of an official daily *Federal Register* in which all significant orders are printed as soon as issued.

³ Art. II, § 2, cl. 1.

⁴ It does not, however, have the effect of restoring money that has been paid as a fine or as court costs, property that has been forfeited, or office that has been vacated. H. Weihofen, "The Effect of a Pardon," *Univ. of Pa. Law Rev.*, LXXXVIII, 177-193 (Dec., 1939).

imprisonment for death, or otherwise lightening a penalty; (5) reprieve, or mere delay of punishment; and (6) refusal to take any action at all. Every application received is looked into by the pardon attorney, and if necessary the attorney-general, in the Department of Justice, and usually the findings and opinions reported enable the chief executive to dispose of the petition as a mere matter of routine. On other occasions, however, grave doubts may exist or important issues of public policy may be involved. In any event, the president alone makes the final decision; and in doing so, he must be prepared, in the interest of impartial justice, to withstand touching appeals and powerful influences. A modified form of pardon is amnesty, which is a sort of blanket pardon extended to numbers of people who, without having been individually convicted, are known to have violated federal law, as by engaging in rebellion. Amnesties may be declared by act of Congress; but the usual method is that of presidential proclamation.

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CHAPTER XX

THE PRESIDENT AND CONGRESS

"Presi-
dential"
and
"cabinet"
govern-
ment

When the framers of our national constitution decided to distribute federal powers among three coördinate sets of authorities—president, Congress, and courts—they, in effect, ordained that we should have a "presidential," rather than a "cabinet," or "parliamentary," form of government; and in later times our presidential plan became a model for most countries in the Western Hemisphere, just as the cabinet system, ripening first in Great Britain, spread throughout the British Empire and most of Western Europe. In a cabinet, or parliamentary, system¹ there is commonly a king or other titular chief executive; he may even be called a president, as in France under the ill-fated Third Republic. Conversely, in a presidential system there is likely to be a cabinet, as in the United States. The difference between the two, however—and it is a basic one—is that (whereas in a cabinet system the working executive consists of ministers (functioning together as a cabinet) who are at the same time members of and leaders in the legislature, and responsible to it (at least to the more popular branch), a presidential executive not only is outside of the legislature, but draws its authority from the same source as the legislature itself, *i.e.*, popular election, and in its relations with the legislature is not "responsible" but rather coördinate; and with the further logical difference that whereas under the cabinet system the responsible ministers remain in office only so long as they continue to enjoy the confidence and support of a legislative majority, a presidential executive has a fixed term and can be ousted from office only by the extreme and unusual procedure of impeachment.

The manifest advantage of the cabinet system is that the executive and legislature can never long be at odds on important matters of policy. Ministers losing legislative support give way, almost automatically, to others at least presumed to have such support; and harmony again prevails, at any rate for a time. Under the presidential form, on the contrary, there is much possibility of protracted discord, division, and frustration, with no assurance of relief until fixed terms of office expire; and for this reason, as well as others, a good many people regard it as unfortunate that we were started off with such a system, and consider that, if it were at all practicable to win the necessary public approval, it would be desirable for us to go over to the cabinet plan, even at this late day.²

¹ The two terms are used interchangeably, according as one is viewing the system primarily from the side of the executive or from that of the legislature.

² The cabinet and presidential types are compared in W. H. Taft, *Our Chief Magistrate and His Powers* (New York, 1916); Chap. I; H. L. McBain, *The Living*

However that may be, the point for emphasis in the present chapter is that, even under the system we already have, the national executive and national legislature, *i.e.*, the president and Congress, are not, in practice, completely isolated from each other, but on the contrary—while constituting far more distinct and separate *foci* of political power than are to be found in a cabinet government, do actually maintain many close contacts and, by and large, become jointly the architects of most of our national legislation and public policy. To be sure, a glance at the constitution might lead one to suppose that the president is important only as an executive. "The executive power" is expressly vested in him; on the other hand, "all legislative powers" are conferred upon Congress. Actually, however, the president is far more than merely an executive—just as Congress is considerably more than merely a legislature. Steadily growing authority to issue orders and regulations makes him, to all intents and purposes, a legislator in his own right; and not only the constitution, but practical necessity as well, assigns him a weighty share in the legislative work of Congress. By availing himself, indeed, of his constitutional authority to convoke Congress in special session, to transmit messages, to recommend measures, and to veto bills, and equally by utilizing his extra-constitutional opportunities to consult with congressmen, to direct the preparation and introduction of bills, to work for the fulfillment of his party's legislative promises, to appeal to the country on legislative programs, and to wield the leadership in policy-framing which under our system is seldom forthcoming on Capitol Hill, the president has tended more and more to become, in addition to chief executive, our chief legislator as well; so that while there is not, and under our constitution cannot be, such an integration of authority as a cabinet system affords, the results attained need not always be, and sometimes are not, materially different. To comprehend, therefore, what the presidency really means in this country, as well as the process by which our national laws are made and national taxes and expenditures authorized, one must look carefully into this matter of the chief executive's relations with Congress—and first of all into an imposing list of ways in which, notwithstanding our vaunted separation of powers, he may participate in, and even dominate, the work of the two houses.

Presidential Control Over Legislation

By constitutional provision, a Congress lasts two years and has one regular session each year, beginning in the first week of January. *Over* the beginning and ending of regular sessions, the president has no abso-

1. Control over sessions of Congress

Constitution, (New York, 1927); and W. Wilson, *Congressional Government* (Boston, 1885); and a review of classic discussions of the subject will be found in H. Hazlitt, *A New Constitution Now* (New York, 1942), Chap. II. Cf. D. K. Price, "The Parliamentary and Presidential Systems," *Pub. Admin. Rev.*, III, 317-334 (Autumn, 1943), and discussion provoked by this article, *ibid.*, IV, 347-363 (Autumn, 1944).

lute control, except that he may adjourn the houses "to such time as he shall think proper" if they find themselves unable to agree on a time of adjournment.¹ Practically, however, he may wield a good deal of influence upon the length of sessions, either by insisting upon legislation that would keep the houses at work—a "must" program, it is sometimes termed²—or, conversely, by withholding proposals which, if submitted, would have the same effect. Almost invariably, the date of adjournment is a matter of more or less amicable agreement between the president and the Senate and House leaders. Furthermore, the president may, at his discretion, convene the houses, or either of them, in special session.³ In former times, when a new Congress would not otherwise meet until thirteen months after election, special sessions were by no means infrequent, and much important legislation was enacted in them—notably in sessions convoked by President Taft in 1909, President Wilson in 1913, President Harding in 1921, President Hoover in 1929, and President Roosevelt in 1933, with a view to getting a new Administration's legislative program under way (and incidentally securing confirmation of appointments) without waiting the many months that must elapse before the opening of the first regular session. Nowadays, however, a different situation obtains. Under the Twentieth Amendment, a new Congress meets as soon as the terms of its members begin; its two regular sessions start in January of consecutive years and run indefinitely toward the January following;⁴ and for special sessions there is little need—unless in an emergency like that created by the outbreak of a major war in Europe in the autumn of 1939, when such a session was called to repeal our embargo on the export of arms to belligerent states and otherwise to amend the Neutrality Act of 1937.⁵

2. Mes-
sages

The constitution's requirement that the president give Congress information on "the state of the Union" and recommend for its consideration "such measures as he shall judge necessary and expedient"⁶ is entirely logical. His position and activities enable him to know many things about both foreign and domestic affairs that are beyond the ken of the members of the legislative branch; he can speak with authority in pointing out defects and needs, and can suggest remedies in line with actual executive and administrative experience; and he is no less under

¹ Art. II, § 3. This power of adjournment has never been exercised, although in October, 1914, President Wilson was urged to make use of it. In the early summer of 1940, President Franklin D. Roosevelt strongly desired that the third session of the Seventy-sixth Congress be terminated; but Congress, impressed with the growing urgency of national defense, and apparently backed by public opinion, was of a different mind, and the issue was not forced.

² Illustrations are afforded by the prolongation of sessions through the summers of 1934, 1935, and 1937 to act on matters urged by the President.

³ Even in this case, the President had tried to get the desired legislation during the preceding regular session. Beginning in 1940, the regular sessions of wartime Congresses ran completely or substantially throughout successive calendar years, leaving no possible room for special sessions.

⁴ Art. II, § 3.

obligation than is Congress itself to put information and ideas at the country's service. How frequently he shall communicate with Congress, at what times, at what length, and in what way, the constitution does not specify. Accordingly, each president exercises his own discretion. It long ago became customary, however, to transmit at the opening of each regular session a comprehensive message summarizing the state of public affairs, calling attention to matters requiring prompt consideration, and perhaps indicating specific plans or measures which, in the president's judgment, ought to be adopted. In addition, shorter messages—sometimes fifty or sixty of them in a session, each usually dealing with a single subject or project—are transmitted as occasion demands or the president desires. A message of this nature may serve to bring formally before Congress a report or other body of material on the basis of which legislation is asked—for example, the annual budget message in which the president transmits the estimates of revenue and expenditure for the ensuing fiscal year, or, as another illustration, President Franklin D. Roosevelt's message of January 12, 1937, placing before the houses the incisive and challenging report of his Committee on Administrative Management, dealing with the problem of administrative reorganization. Such a message may, indeed, be accompanied by a fully drafted bill which Congress is requested to enact, a good illustration being the measure transmitted with President Roosevelt's message of February 5, 1937, contemplating various changes in the federal judicial system, including an increase in the membership of the Supreme Court.¹ On the other hand, a special message (in this case addressed only to the house in which the measure originated) may be devoted to explaining the reasons for vetoing a bill already passed.

Washington and John Adams appeared in person before the two houses in joint session and delivered their messages orally. Jefferson, however, sent in his messages in writing; and this practice prevailed until 1913, when, somewhat to the consternation of Congress, the oral form was revived by President Wilson. Oral messages were employed by President Harding; and, with the aid of the radio, President Coolidge read his first two annual messages to both Congress and the country. President Hoover reverted to the written message, and President Franklin D. Roosevelt employed first one form and then the other.² The oral message has some advantages: it is likely to be more concise than the

Oral and
written
messages

¹ See p. 472 below. On this occasion, mimeographed copies of the bill were attached to copies of the message and in that form distributed to members immediately before the message was read. Such a bill must, however, be actually introduced by a committee chairman or other member of Congress.

² The latter's decision to deliver his annual message of January 3, 1936, orally, with a nation-wide radio hook-up, and in the evening rather than during the day, aroused partisan criticism on the ground that a solemn constitutional function was being turned into a key-note speech in a campaign for reelection. The complaint was hardly justified, although some portions of the speech would probably have been more appropriate in a "fireside" talk addressed to the people directly.

written message, which, if the truth be told, has in plenty of instances been diffuse and uninteresting; ¹ it gives the president a chance to make his personality felt, not only in Congress, but (by means of the radio) throughout the country; and, even if only momentarily, it brings the executive and legislative branches into a closeness of touch which under a presidential form of government is too often lacking. On the other hand, the oral message may solidify opposition and precipitate conflicts which a written communication would hardly arouse.

The
effects of
messages

How influential presidential messages are is a matter upon which it is difficult to generalize: Certainly they receive more publicity than does any other government document. Congress, however, is not obligated beyond giving a respectful hearing; it may take action quite out of line with the recommendations made, or it may refuse to act at all. Much depends, of course, upon whether the president's party is in control of both houses. But even if it is, there is no guarantee that his advice will be followed. Sometimes, it may be added, a message is really aimed at the country, or even at the world at large, rather than at Congress. The president may desire to stimulate public interest in and discussion of a given subject, with or without a view to legislation, and may use the congressional message as a means to that end. Theodore Roosevelt did this repeatedly. Or he may want to make his Administration's attitude known to a foreign state or group of states without incurring the embarrassments that might flow from resort to the customary diplomatic channels; as, for example, when Monroe, in 1823, slipped into his annual message to Congress statements serving notice to the European Powers that the American continents were no longer open to new colonization, thus laying the basis for the significant national policy ever since known as the Monroe Doctrine. In numerous oral messages during the first World War, President Wilson summed up and unified the thought of the country on submarine warfare and other challenging aspects of the international situation; likewise, in his message of January 2, 1918, he set forth, virtually on behalf of the Allied and Associated Powers, and in the form of his famous "Fourteen Points," the major terms or conditions deemed indispensable to a peace settlement. From Franklin D. Roosevelt's messages during his second and third administrations, one could arrive at a tolerably complete picture of the country's developing foreign policy in a period of growing tension and ultimate war.

8. Initi-
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tion

By requiring the president to recommend to Congress "such measures as he shall judge necessary and expedient," the constitution in effect confers upon him the power, and indeed the duty, of legislative initiative. In point of fact, a very large proportion of the public bills that crowd the calendars of Congress originate with the executive branch of

¹ That presidents sometimes labor hard to achieve brevity and force is indicated by the fact that the initial draft of President Hoover's first annual message ran to 60,000 words and the final draft to only 12,000.

the government—the departments and their subdivisions, the independent establishments, and the president himself. To be sure, many of these are of more or less routine character, extending, interpreting, or modifying statutes to meet needs that administrative experience has brought to light. But others are of first-rate importance—breaking new ground, introducing new policies, providing for action that will vitally affect large numbers of people. The president may be deeply concerned about far-reaching changes and reforms, as Theodore Roosevelt was about the regulation of corporation procedures, or Woodrow Wilson about the improvement of banking and trade practices. National difficulties may press upon him, as they did upon Herbert Hoover. A national crisis may confront him, as a disastrous banking situation confronted Franklin D. Roosevelt when he first took office in 1933, and again an international threat, when, in 1940, the world situation suddenly thrust upon the country the necessity of embarking upon a stupendous program of defense. But whether or not such special conditions exist, he will find it incumbent upon him to meet public expectation in at least some degree by thinking about laws that ought to be passed, by working with the appropriate subordinates and advisers in formulating suitable measures, by seeing that the proposals are duly introduced in the House or Senate, and by using his influence to get them on the statute-book.¹

4. Guidance in finance

In the domain of finance, the president's relations with Congress are particularly close. ~~Never having developed any very effective agency of its own for attaining coöperation between the two houses, or for formulating policy, with respect to the budget as a whole, the legislative branch depends heavily upon the executive for leadership; and, as indicated elsewhere, the Budget and Accounting Act of 1921 made the president, through the director of the budget, virtually the general business manager of the government.~~² In that capacity, he annually transmits to Congress full information concerning the national finances, together with a coördinated fiscal plan for the coming year; in special situations, such as that existing during the recent period of defense preparations, and of war, he transmits supplementary requests for appropriations; and while the two houses are not obliged to meet his demands in full, or, on the other hand, to stay within the limits of expenditure which he recommends, they are likely to hear from him in no uncertain terms if they fail to do either. There was a time when the president's influence was

¹ On occasion, the president not only may suggest or request legislation, but may adopt a strong tone in demanding it. As an extreme illustration may be cited an occurrence of September, 1942, when, with a view to averting the disaster of inflation, President Franklin D. Roosevelt bluntly told Congress and the country that unless by October 1 there should be legislation repealing a provision of the Emergency Price Control Act of the previous February 2, prohibiting ceilings on food products until farm prices had gone, on the average, sixteen per cent beyond "parity prices," he would fall back upon his powers as commander-in-chief and take whatever action he deemed necessary. Under the threat thus held over it, Congress grudgingly complied.

exerted mainly to keep Congress from playing fast and loose with the nicely adjusted plans which his budget agency, in conference with the revenue and spending authorities, had worked out; but in the past decade of unprecedented spending, it has fallen, rather, to economy-minded leaders in the two houses to try to call a halt upon outlays of which the president had approved.

The Veto Power

5. The
veto
power

Next we come to the important function of approving or disapproving bills and resolutions passed by Congress, involving, of course, the veto power. The veto as wielded by executive authorities, especially the later colonial governors, was not in very high repute when the constitution was adopted. The designers of the new federal system had in mind, however, a balanced government in which each branch should be prevented from encroaching upon the rights or absorbing the powers of the other branches; and the most feasible means of defense for the executive against encroachments by the legislature seemed to be the power of veto. Furthermore, as Hamilton urged in *The Federalist*, the veto would "furnish an additional security against the enactment of improper laws."¹ Accordingly, the constitution requires that every bill which shall have passed the two houses of Congress shall, before it becomes a law, be presented to the president, who, if he approves, shall sign it, and if he disapproves, shall return it, with his objections, to the house in which it originated, and it shall then become law only if both houses, by two-thirds vote, again pass it.² To be sure (except under certain conditions explained below) the veto is not absolute, but only suspensive. It makes necessary a reconsideration of a disapproved bill or resolution; it gives the president an opportunity to present a formal argument against the measure; and it makes a second passage more difficult than the first. But it does not kill a measure

¹ No. LXXIII (Lodge's ed., 458).

² Art. I, § 7, cl. 2. The ensuing clause goes on to say that "every order, resolution, or vote" (except on a question of adjournment) to which the assent of both houses is necessary shall be presented to the president and be subject to the same veto procedure as a bill; and "joint resolutions," regarded as tantamount to bills, are so treated except those submitting constitutional amendments for action by the states. Not only is this latter exception made in the face of what seems a plain constitutional stipulation, but rather frequent resolutions of another type, i.e., "concurrent resolutions," are never submitted. Often such concurrent resolutions are merely declaratory of an attitude or opinion, but sometimes they have to do with the publication of documents or with other matters not too easily distinguished from subjects of legislation. When, in April, 1937, the Senate was about to pass a concurrent resolution condemning sit-down strikes as "illegal and contrary to sound public policy," the Republican leader sought in vain to have the form of joint resolution substituted in order that the President might be forced to take a position on the subject. In recent years, the concurrent resolution has taken on a new and more important aspect, in that legislation granting powers to the president has sometimes reserved the right of Congress to nullify or terminate presidential acts performed under such legislation, and to do so by *concurrent resolution*—which would give the president no opportunity to reverse the action by veto. The Reorganization Act of 1939 and the first "Lend-Lease" Act of 1941 contained provisions of this nature. See H. White, "The Concurrent Resolution in Congress," *Amer. Polit. Sci. Rev.*, XXXV 605-606 (Oct. 1941); cf. *ibid.* XXXVI 605-606 (Oct. 1942).

for which a sufficient amount of legislative support can be mustered.

When a bill or resolution is passed by the two houses and presented to the president, any one of four things may happen. (1) The president may promptly sign it, whereupon it becomes law. (2) He may hold it without either signing or vetoing it, in which case it becomes law at the expiration of ten days (Sundays excepted), without his signature, provided Congress is still in session.¹ He may adopt this course because he dislikes the measure and is unwilling to put his name to it, although recognizing that a veto would be useless or politically harmful; or because he is undecided about its constitutionality or general merit and prefers not to commit himself. (3) He may hold the measure on his desk—figuratively, tuck it in his pocket—and by so doing quietly kill it if Congress adjourns within ten days.² Because of obviating the necessity of making a formal explanation to Congress (sometimes politically disadvantageous), a “pocket” veto may, from the president’s point of view, be preferable to a regular “messed” veto;³ and many bills come to grief in this way, particularly by reason of the fact that as a rule considerable numbers of measures are rushed through Congress in the closing days of a session and require only to be “pocketed” by the president to be kept off the statute-book. Formerly, it was considered that no bill might be signed after Congress had adjourned. Backed by the opinion of his attorney-general, President Wilson in 1920, however, signed a number of bills after adjournment; and the right to do so (within a ten-day period after presentation of the bill) has been unanimously affirmed by the Supreme Court.⁴ Finally (4), a bill may be vetoed outright. That is to say, the president may, by positive act, disapprove it, in which case it goes, with a message giving his reasons, to the house in which it originated.⁵ As has appeared, a pocket veto, even though arising from mere inaction, is the strongest veto of all, because there is no opportunity for Congress to reverse it. A “messed” veto has the effect, rather, of starting a reconsideration of the bill, first in the house of its origin, and afterwards, if successful there, in the other house; and if the hurdle

Courses open to the president on a bill or resolution

¹ The fact that the ten-day period is reckoned from the presentation of the bill—not its passage—became of much importance when President Wilson went abroad in 1919 to participate in negotiating the Treaty of Versailles, and again in January-February, 1915, when President Franklin D. Roosevelt was absent from the country some five weeks in connection with wartime conferences abroad.

² In the case of *Okanogan Indians v. United States* (279 U. S. 655), often referred to as the Pocket Veto case, the Supreme Court held in 1929 that this means ten calendar, not legislative, days. It held also that the rule applies to any congressional adjournment, not merely final adjournment at the end of a Congress—although the practice had always been on the latter assumption. See *Amer. Polit. Sci. Rev.*, XXIV, 67-69 (Feb., 1930).

³ President Franklin D. Roosevelt, however, initiated the practice of attaching an explanatory memorandum to each bill pocket-vetoed.

⁴ *Edwards v. United States*, 236 U. S. 482 (1932).

⁵ In *Wright v. United States* (302 U. S. 583), the Supreme Court held, in 1938, that a vetoed bill can validly be returned to a branch of Congress at a time when it has recessed and only the other branch is in session. In such a situation, said the Court, “Congress” is still in session.

of a two-thirds vote can be surmounted at both ends of the Capitol, the measure becomes law notwithstanding the president's disapproval.¹

Fre-
quency
of vetoes

In *The Federalist* paper quoted above, Hamilton ventured the prediction that the veto would generally be employed with great caution, and that there would be more danger of the president "not using his power when necessary, than of his using it too often, or too much." For many decades, at least, this forecast was borne out. Not until Andrew Johnson's administration did any president deem it necessary to resort to a veto in defense of his own constitutional rights; and altogether it has been used for this purpose no more than a dozen times. Indeed, there were only fifty-one vetoes, all told, before the Civil War. The first six presidents vetoed bills only on the ground that they were unconstitutional or technically defective.² Jackson, who in sundry ways made the presidency something different from what it had been before, gave the veto a new twist by employing it to defeat measures admitted to be constitutional and technically correct, but considered objectionable in their aim and content.³ Yet Jackson, in eight years, vetoed only twelve bills. In the turbulent era of Reconstruction, the veto was employed more freely, and later presidents have not taken the conservative attitude of their remoter predecessors. Except in the cases of Grover Cleveland and Franklin D. Roosevelt, however, the number of vetoes has rarely averaged more than five or six a year; between them, those two presidents are responsible for more than two-thirds of all presidential vetoes in the country's history—in the case of Cleveland (a total of 584), largely vetoes of pension and other private bills, in that of Roosevelt (a total of 624 to the end of 1944), vetoes of the widest variety of measures, both public and private.⁴

¹ When, on May 22, 1935, President Franklin D. Roosevelt appeared before a joint session of Congress to deliver a veto message in person, he introduced a new and dramatic feature of veto procedure.

A variation upon the procedures described arose in 1934 when, an equal-rights nationality bill having been presented to President Roosevelt, he conferred with the legislative sponsors of the measure and induced the houses to recall the bill by concurrent resolution for amendment along specified lines.

² Except that Madison vetoed two measures on grounds of policy.

³ He also claimed and exercised the right to veto bills which he thought unconstitutional notwithstanding that the Supreme Court had ruled to the contrary. The best illustration is the veto, in 1832, of the bill to renew the charter of the United States Bank. There can be no doubt that in his broader interpretation and use of the veto power Jackson was entirely within his rights. The constitution simply says that if the president "approves" a bill he shall sign it, and if not he shall return it. "No better word," former President Taft once observed, "could be found in the language to embrace the idea of passing on the merits of the bill." *Our Chief Magistrate and His Powers*, 16.

⁴ G. C. Robinson, "The Veto Record of President Franklin D. Roosevelt," *Amer. Polit. Sci. Rev.*, XXXVI, 75-78 (Feb., 1942). Professor Robinson (of Iowa State Teachers College) is in possession of very complete and reliable data on presidential vetoes throughout the country's history. Full information for the period after 1889 can be obtained from R. L. Baldrige [comp.], *Record of Bills Vetoed and Action Taken Thereon by the Senate and House of Representatives, Fifty-first Congress to Seventy-sixth Congress, Inclusive, 1889-1941* (Washington, 1941).

It is interesting to notice that President Franklin D. Roosevelt's 624 vetoes (to the end of 1944) constituted more than a third of the total number (1,754) in the country's history to the date mentioned. Somewhat over half were "messaged," and the remainder were of the pocket variety.

Of eight presidents who made no use of the veto power at all, the most recent was Garfield—though it should be added that Congress was never in session during his brief tenure.

The most significant thing is not, however, the tendency toward increase in the number of vetoes. The really important matter is the freedom with which presidents, as one writer has put it, "offset their own judgment against that of Congress, not merely on great questions involving the public welfare, and on disputed constitutional questions, but on trivial matters whereon their means of information are not greater or better than those at the command of Congress, and whereon their individual judgment does not appear to be superior to that of the average congressman or senator."¹ In other words, the veto power has been so expanded by usage as to become a general revising power, applicable to all legislation, whether important or not, and whether relating to public matters or to private and personal interests. The result has been to make the president a far more active and potent factor in legislation than he originally was, or was intended to be.

General expansion of the veto power

This does not mean, however, that the veto power has, in these later days, been used loosely and irresponsibly. On the contrary, it has commonly been employed reluctantly and with due discretion. Most vetoes of measures important enough to have attracted popular attention have been supported by public sentiment, and comparatively few have been overridden by subsequent action of Congress. Not until Tyler's administration did any vetoed bill receive the two-thirds vote in both houses necessary to make it law. Wilson was reversed six times, and Cleveland seven, but Coolidge only four times; Hoover, three times; Harrison, Theodore Roosevelt, and Taft, once each; and McKinley and Harding not at all. To January, 1945, Franklin D. Roosevelt's unsuccessful vetoes numbered only nine.² In practice, therefore, the "messed" veto tends to become almost as absolute as the "pocket" variety; only rarely and with great difficulty can sufficient votes be mustered in the two houses to override an unfavorable presidential decision. This has led to the suggestion that the veto power be weakened by making it possible for a vetoed

Few vetoes overridden by Congress

¹ E. Stanwood, *History of the Presidency from 1898 to 1916* (new ed., Boston, 1928), 324.

² Among the most noteworthy measures to become law over the veto in the last thirty-five or forty years are the Webb-Kenyon Act, vetoed by Taft; the Volstead Act and an immigration act providing for a literacy test, vetoed by Wilson; the Soldiers' Bonus Act, vetoed by Coolidge; the Bonus Loan Act and the Philippine Independence Act of 1933, vetoed by Hoover; and three measures vetoed by Franklin D. Roosevelt, i.e., the Bonus Act of 1936, the Smith-Connally War Labor Disputes ("Anti-Strike") Act of 1943, and (on the occasion of the first veto of a measure of the kind in our national history) the Revenue Act of 1943. The message vetoing the last-mentioned measure touched off a volcano of protest in Congress and prompted Alben W. Barkley, the majority leader in the Senate, to resign the leadership for which he had been picked by the President—although he quickly accepted reelection by the Senate majority caucus as the independent choice of that body. President Roosevelt's veto of the Logan-Walter Bill of 1940, giving dissatisfied persons a right to demand judicial review of rulings of regulatory commissions, failed narrowly to be overridden. See pp. 415-416 below.

measure ultimately to prevail by being repassed in the two houses by a simple majority (as is the rule in a number of states), rather than the present two-thirds. On the other hand, it has been suggested that the veto be strengthened by requiring that a bill, to be carried over a veto, shall be repassed by an affirmative vote of two-thirds of the entire membership of each house, instead of, as now, by two-thirds of a quorum in each.¹

The
question
of veto
of items

Another, and decidedly more important, proposal looking to the strengthening of the veto power is that authority be conferred to veto single items of a bill while nevertheless approving the measure as a whole. Some people consider that there ought to be such authority in respect to all bills whatsoever; many would like to see it applied to tariff bills; but the proposal is usually aimed mainly or exclusively at appropriation bills. As matters stand, the president must approve or disapprove a bill in its entirety; he cannot accept part and reject part. When a tariff bill is presented to him, he might like to veto particular schedules, inserted perhaps at the insistence of self-seeking "pressure groups"; and it might be decidedly to the country's interest for him to do so. But he must choose between signing the measure as it stands and vetoing the good with the bad. When an army bill, a river and harbor bill, or any other comprehensive measure appropriating money is placed on his desk, he may find among its scores, and even hundreds, of items several to which he takes, and ought to take, exception—perchance among them a "rider" or two incorporating provisions on some wholly extraneous subject which there would be little hope of getting through in any other way. To veto the entire measure would, however, inflict hardships (*e.g.*, prevent salaries from being paid) and perhaps seriously impede the operation of some branch of the government; and, rather than incur these disadvantages, he is almost certain to affix his signature, however contrary to the interests of public economy. All but nine of the states have met a similar situation by empowering the governor to veto separate items; and in some instances he is also allowed to reduce the amount carried by an item. For more than sixty years, the item veto has been advocated for the national chief executive, and in 1938 the House of Representatives wrote a provision for it into a major appropriation bill, in response to an urgent request from President Roosevelt. On the ground that the scheme amounted to an invasion of congressional authority and could properly be adopted, in any case, only by constitutional amendment (some seventy amendments on the subject had been introduced since 1873), the Senate refused to concur; and the matter remains where it was.

¹Effort has sometimes been made to show that this higher requirement is already the law. Thus, in a case decided by the Supreme Court in 1919, the plaintiff contended that the Webb-Kenyon Act was not a valid piece of legislation, since, after veto of it by President Taft, it was passed in the Senate by a vote only of two-thirds of the senators present, rather than two-thirds of the total membership of the body. The Court refused to take this view. *Missouri Pac. Ry. Co. v. State of Kansas*, 216 U. S. 262 (1910).

Quite apart from the question of method, there is room for difference of opinion on the proposal's inherent merit. Power to veto items would enable a president to discriminate in a wholly undesirable way, if he should choose to do so, between proposed expenditures in which congressmen who supported him were interested and those which were of concern to his opponents; and Congress might fall into the habit, as have some state legislatures, of gratifying departments and pressure groups by voting appropriations far in excess of the estimated revenues and deliberately transferring to the president both the burden of whittling down such appropriations and the unpopularity likely to arise from doing so. The adoption of a budget system in 1921 improved matters materially; and if only there could be incorporated into it, by law or practice, the salutary English plan under which the legislature adds no new items of expenditure to those requested by the executive, and makes no increases in the amounts asked, the question of veto of items would, so far as appropriations are concerned, cease to be important. There is, however, no present prospect of this being done.¹

Other Presidential Weapons and Techniques

Convening Congress in special session, sending messages (or delivering them orally), initiating bills, transmitting budget proposals, and wielding the veto power by no means exhaust the president's resources in influencing legislation. By letting it be known that he will veto a pending bill unless certain features are added to or withdrawn from it, or other changes made in it, he may be able practically to determine the form which the measure will finally take, or even to prevent it from being passed at all. 1. Threat of veto

When Theodore Roosevelt gave Congress public warning that he would veto certain measures if sent to him, loud protest was raised against such virtual use of the veto in advance. No one, however, could find anything in the constitution or laws to prevent a chief executive from making his views and intentions known whenever he desires, and in later days, as the leadership of the White House in legislation continued to grow, threat of veto became one of the most familiar of presidential weapons. Sometimes the expedient serves its purpose forthwith by causing a bill to

¹ Meanwhile, the item veto would be useful in connection with general, as well as financial, legislation. In 1920, President Wilson felt obliged to veto a bill providing for the introduction of a national budget system of which he warmly approved, because he believed a provision of it relating to the method of removing the comptroller-general to be unconstitutional. In 1924, President Coolidge signed a bill forming the basis of our present immigration law, but indicated that he would have liked to veto provisions of it regarded as certain to produce friction with Japan. In 1943, President Roosevelt would have preferred to veto an indefensible rider attached to a deficiency appropriation bill and aimed at preventing the further employment in the federal service of three individuals named (see p. 361, note 2, above), but was obliged to accept the measure as it stood rather than jeopardize the carrying on of essential government functions; also he would have been glad to apply the knife to a section in a bill authorizing an increase of the national debt limit, for the reason that the offending section annulled a ceiling of \$25,000 after payment of taxes which he had imposed on salaries in wartime, but there was no way of doing so without frustrating a new loan which the government needed immediately.

be abandoned, especially if there is no reason to suppose that the majorities necessary to overcome a veto could be obtained for it. Sometimes, however, Congress persists in passing a measure, and thus putting itself on record with the country, even though well aware that a veto message is ready to be transmitted the moment the bill reaches the president's desk. Sometimes, indeed, congressmen who want to stand well with their constituents vote for a dubious measure with an easier conscience because they know that the chief executive is going to kill it. Supported by heavy majorities in both branches of Congress, Franklin D. Roosevelt, during his first two administrations, had less occasion to employ the veto threat than have presidents less happily situated. The Logan-Walter Bill of 1940,¹ however, was passed by Congress in full knowledge that a veto awaited it; and a growing spirit of independence in a more divided Congress in later years caused the device to be brought more frequently into play. When, for example, the two houses sent the Revenue Act of 1943 to the President's desk, they were prepared for a veto, even if not for the vigorous language in which it was couched.

2. Use
of pat-
ronage

A less obtrusive and rather commoner means of presidential influence on legislation is the distribution of patronage.² As observed in an earlier chapter, candidates for offices filled by the president and Senate are usually brought to the chief executive's attention and urged upon him by senators (sometimes representatives) from states in which positions have become available; and success or failure in securing appointments invariably goes far toward determining a member's standing with his party in the home bailiwick. In his dealings with senators and congressmen of his party, the president therefore holds the whip hand; if they fail to support policies and measures³ in which he is interested, he has only to turn a deaf ear to their pleas for patronage in order to subject them to back-fire from office-hungry constituents.⁴ To be sure, overt threats and definite bargains on the subject are not often made.⁵ But members can hardly be expected to be oblivious to the practical advantages of being numbered among the supporters upon whom the president will feel that he can depend; and we have the word of a former president that the control over legislation arising from this source is very great.⁶ Naturally, it will be at its peak when a new Administration, of different political faith, has come in, with plenty of offices at its disposal, and in a session taking place immediately, *i.e.*, before appointments have been made. Since the Twentieth Amendment took effect, every new Administration starts almost simultaneously with the first regular session of a new Congress, so that the maximum of opportunity for presidential influence through patronage is bound to arise the moment a president of different

¹ See pp. 415-416 below.

² An historic case is President Cleveland's direct and open threat to withdraw patronage from Democratic senators failing to support the repeal of the Silver Purchase Act in 1893.

³ W. H. Taft, *Our Chief Magistrate and His Powers*, 27.

political complexion enters the White House. An incoming chief executive who wishes to make full use of his power of patronage will naturally be slow about distributing the loaves and fishes, keeping his followers in a state of expectancy as long as he can while the more important parts of his program are being translated into law. Thus it is generally understood that Franklin D. Roosevelt's appointments in 1933 were systematically held back in order to keep wavering senators and congressmen in line while novel, and sometimes startling, measures for national recovery were being enacted. Congressmen may fret and fume, but this is part of the price they pay for perpetuating patronage in the upper brackets of the national service.¹

A variant of this procedure appears when, in addition to withholding patronage, the president tries to influence members of his party not to reelect senators or congressmen who have opposed his legislative measures or whose general attitude on public policy is out of line with his own. This he may do by quietly but none the less significantly abstaining from any word of endorsement or approval; but he also may openly denounce a candidate and appeal to the electorate against him. The most notable recent instance of employment of the latter technique (and on a large scale) was President Franklin D. Roosevelt's unsuccessful attempt in the elections of 1938 to "purge" Congress of Democratic members who had opposed his Court reorganization bill and other measures.²

3. Intervention in elections

Still another source of influence is personal contact, conference, and persuasion. To be sure, the president does not appear on the floor of either branch of Congress to take part in debate, or indeed for any purpose other than to read an occasional formal message.³ But this does not prevent him from discussing measures and policies with large numbers of members, individually and in small groups, in his office or his study at the White House, over the griddle cakes and sausages at the breakfast table (a well-known Coolidge custom), or even in the room set apart for him at the Capitol. From early in his first administration, Franklin D. Roosevelt made political use of a Monday morning conference participated in by the vice-president, the speaker of the House, the Democratic leaders in the House and Senate, and chairmen of varying committees having major bills pending; and every one around Washington knew that this weekly meeting, at which the chief executive received a report

4. Personal conference and persuasion

¹ They realize, too, that they may personally stand in need of presidential favor if, failing of reelection, they later seek consolation in some sort of federal appointment.

² See "What Flows from the Purge?" [Symposium], *Cong. Digest*, XVII, 225-256 (Oct., 1938).

³ He probably loses nothing by this, because if he participated in debate on the floor, what he said would soon come to be looked upon as of little more significance than if uttered by a senator or representative; and this would both lower the dignity of his office and lessen his influence with the people. Anyway, few votes are ever changed by debate. President Hoover's appearance before the Senate in 1932 to argue for a sales tax which would have aided in balancing the budget was a very exceptional occurrence, and in the outcome it yielded no practical result—except to stir resentment among the senators. *Cong. Record*, 72nd Cong., 1st Sess., Vol. 75, p. 11732.

on the status of the legislative program and told the conferees what he wanted done, was of large importance—often larger than meetings of the cabinet. There are occasions, too, when a president calls into conference the chairman and other influential members (perhaps including representatives of the minority party) of a single standing committee; and at such times he may urge or demand that a given measure be postponed, or that it be speeded up, or that it be amended in specified ways.¹ When confronting congressional groups of these sorts, he may employ arts ranging all the way from genial encouragement or gentle persuasion to bold ultimatum, *e.g.*, a threat to hold Congress in session until it does what he desires, or, conversely, to veto a pending or proposed bill if passed. On the other hand, he may be induced to accept amendments to bills in which he is interested, or even to make important changes in his general legislative program. In any event, his views, promptly carried back to the two houses by the conferees, are likely to exert a good deal of influence. "Stand by the president" is, as a rule, a catch-phrase of considerable potency in congressional halls. Executive control over legislation by this method was exercised conspicuously by Presidents Cleveland, Wilson, and the two Roosevelts.²

5. Appeals
to the
country

In the long run, nothing is so useful to the president in his dealings with Congress as the backing of public sentiment. Members cannot afford to fly in the face of their constituents, and if the president is strong in city and countryside, he commonly has little to fear. Realizing this, every president courts popular approval for himself and his policies. Some are more adept at cultivating the public than are others; some more fortunate in occupying the White House at times when popular acceptance and support are easy to win. But all have unmatched opportunities for publicity, and all can utilize messages to Congress, addresses on carefully chosen public occasions, greetings (in person or otherwise) to organizations and meetings, press conferences,³ conferences with key

¹ The full membership of a committee, or even of more than one committee, may be called into conference. Thus on January 14, 1934, President Roosevelt conferred at the White House with the entire membership of the banking and currency committees of both houses—a total of forty-five persons.

² To supplement personal conferences, recent chief executives, notably Hoover and Franklin D. Roosevelt, have at times employed a "contact man" charged with serving as a general *liaison* between the White House and the Capitol. In his earlier years, President Wilson did not utilize face-to-face conferences so much as some other presidents, but he made heavy use of the telephone.

³ When President Franklin D. Roosevelt was in Washington, a hundred or more representatives of American (and some foreign) press associations and leading newspapers visited him in a body ordinarily twice a week and heard whatever he cared to tell them, including replies to such of their questions as he chose to answer. Cabinet members (notably the secretary of state) and other high officials hold press conferences also; and, notwithstanding recurring complaint of the country being kept in the dark (especially in wartime), more effort is nowadays made in executive circles to cultivate press and public relations than in any previous period. The President's press conferences alone totalled 929 between March, 1933, and December, 1943. See L. C. Rosten, *The Washington Correspondents* (New York, 1937), and "President Roosevelt and the Washington Correspondents," *Pub. Opinion Quar.*, I, 36-52 (Jan., 1937); L. Rogers, "President Roosevelt's Press Conferences," *Polit. Quar.*

citizens and with delegations, letters addressed to private individuals but intended for the public, and notably, in the last decade, heart-to-heart talks to the people by radio (in the fashion so successfully employed by the mellifluous-voiced Franklin D. Roosevelt), calculated to bring the presidential personality to millions of firesides and stir the country to confidence, admiration and support.¹ Woodrow Wilson, in 1918, made one of the most famous of direct presidential appeals to the country, on the issue of the League of Nations. Perhaps his supreme effort was foredoomed to failure, but in any event it was cut short by a physical collapse in the course of a transcontinental speaking tour.²

One further form of presidential activity requires mention in this connection, i.e., the appointment of temporary commissions charged with investigating specified subjects or problems and reporting data and conclusions which may be made the basis of recommended legislation. Congress creates committees of its own members for similar purposes; but the commissions here referred to are initiated, appointed, and instructed by the president, with or without appropriations from Congress to cover their expenditures (salaries are never provided), and their reports are presented directly to the president, for such use as he may care to make of them. The object may be to bring to light full data on some broad subject on which legislators, administrators, educators, and indeed the public at large need to be better informed—good illustrations being afforded by President Hoover's Commission on Law Observance and Enforcement (the Wickersham Commission) appointed in 1929, his Commission on Social Trends, appointed in 1930, and President Franklin D. Roosevelt's Temporary National Economic Committee, set up in 1938. Or the purpose may be to prepare the way for legislation in a given field, as when President Roosevelt's Committee on Economic Security, appointed in 1934, was given the task of making studies preliminary to what turned out to be the momentous Social Security Act of 1935. Or the

G. Appointment of fact-finding commissions

IX, 360-372 (July-Sept., 1938); J. H. Crider, "The President's Press Conference," *Amer. Mercury*, LIX, 481-487 (Oct., 1944). "The Best Show in Washington," *N. Y. Times*, July 27, 1941, presents a good account of Roosevelt's often lively meetings with the correspondents.

¹ President Roosevelt's appeals to the people in his numerous radio talks during his first administration were not those of a champion against Congress, which, on the whole, was tractable enough, but rather those of a national leader reporting on what was being done and why, and seeking to sustain public morale. Without employing the radio directly to build back-fires against refractory senators and congressmen, he in later years made clever appeals over the air for popular support of the greater measures and policies to which he was devoted; and from time to time during the defense effort of 1940-41 and the war effort of 1941 and after, he talked to the country about the situation as currently developing and stressed the need for understanding and cooperation on the part of all of the people. The presidential secretary in charge of public relations is authority for the statement that some of the President's war-time talks were heard by as many as 61,500,000 people, or some seventy-nine per cent of the country's adult population.

² An interesting analysis of "presidential propaganda" will be found in L. Rogers, *The American Senate*, Chap. vii, although radio broadcasting has added a technique of major importance since Professor Rogers wrote. Cf. H. W. Stoke, "Executive Leadership and the Growth of Propaganda," *Amer. Polit. Sci. Rev.*, XXXV, 490-500 (June, 1941).

intent may be to lay the foundation for extensive administrative reforms, as in the case of President Roosevelt's Committee on Administrative Management, appointed in 1936, and making recommendations summarized in the following chapter,¹ and also his Committee on the Improvement of the Civil Service (the Reed Committee), appointed in 1939. As a rule, Congress does not take kindly to the creation of such agencies, preferring (often in a futile sort of way) to do its own investigating.² However— notwithstanding that it would be difficult to show that much actually happened after certain investigations were made—a great deal of useful fact-finding work has been done, large amounts of useful information have been amassed (some of it, to be sure, soon going out of date), a few major administrative changes have resulted, and a fair amount of desirable legislation has been given an impetus without which it might never have been enacted.³

Circumstances Favoring Presidential Leadership in Legislation ✓

1. The president as party leader

Certain practical situations operate to the president's advantage in employing the constitutional powers and extra-constitutional techniques enumerated. First of all is his position as leader of his party. Originally, the chief executive was not a party man; Washington thought of himself as identified with no party and chief of no faction. When, however, parties came into the field and presidents began to be elected as party representatives, party leadership became as truly a function of the president as it is of the English prime minister; and it is nowadays a hardly less important source of power than is the authority conferred in the constitution itself. Chosen as a party man to head a government operated frankly under the party system, the president surrounds himself with advisers of his own political faith, consults chiefly his fellow-partisans in Congress on proposed appointments, confers mainly with them on the framing of policy, and depends primarily on their loyalty and support for realization of his legislative program. He represents the party throughout the entire country, as members of Congress do not; and the country looks to him, even more than to Congress, for fulfillment of the pledges which his party has made. Everything that affects the standing and prospects of his party has bearing upon the success of his administration, and hence is of concern to him personally. One therefore will not be surprised to find him claiming supreme direction of his party's affairs. While still only a presidential candidate, he picks the chairman of the national committee of the party, and may further influence the

¹ See p. 412, note 2, below.

² An illustration of this short-sighted attitude is afforded by the cutting off of all appropriations in 1943 from President Roosevelt's National Resources Planning Board (see pp. 597-598 below).

³ Reports of presidential commissions are usually printed and thus made available to members of Congress as well as to other people in the government. Sometimes, however, the Administration has the advantage, when its bills are being considered, of having the information while its opponents have only theories and emotion.

make-up of that group, as well as of other party committees; after assuming office, he may take a hand in the selection of congressional and other candidates, and may appeal to the voters to give them support, as did Theodore Roosevelt in the congressional elections of 1906 and Woodrow Wilson, less successfully, in those of 1918;¹ he may suggest, and even dictate, planks to be included in party platforms, both national and state; he may, indeed, to all intents and purposes decree his own renomination (as did Franklin D. Roosevelt in 1940 and 1944) or the nomination of the man whom he favors as his successor (as Theodore Roosevelt forced the nomination of Taft by the Republicans in 1908). Jefferson, Jackson, Lincoln, McKinley, Wilson, and the two Roosevelts may be enumerated as presidents who in a preëminent degree dominated their respective parties.²

It goes without saying that the president's relations with Congress, including his control over legislation, depend very largely upon the party situation at a given time, and upon the vigor and skill with which he capitalizes upon his position as party leader. The most favorable circumstance is one in which a new president, with a definite and attractive program, comes into office along with a Congress containing substantial majorities of his own party in both houses, as was the fortune of Woodrow Wilson in 1913 and Franklin D. Roosevelt in 1933. If to this situation be added a national emergency requiring prompt and drastic action—as certainly was the case in 1933—opportunity is proportionately increased. Under such conditions, the limits of leadership and control are, speaking broadly, fixed only by the president's own competence, energy, and persuasiveness. The least favorable circumstance, on the other hand, is of course one in which a chief executive, with perhaps his own initial zeal somewhat dulled, has seen his party's majorities melt away, in one house or both.³ To be in supreme command of his party the country over is a

Effects
on rela-
tions
with
Congress

¹ Or, as we have seen, he may throw his influence *against* the election or reelection of certain candidates.

² An English or Canadian prime minister going out of office with his party remains the recognized party leader, but not so with an American president, whose position in a more or less leaderless opposition party is at best only that of nominal chief, as illustrated by the rôle of Herbert Hoover in the Republican party after 1933.

³ The nadir used to be reached in the closing session of a Congress taking place after the president himself had been defeated for reelection. Under the calendar introduced by the Twentieth Amendment, this situation—last witnessed in the case of Mr. Hoover in the winter of 1932-33—cannot arise again (unless in the extremely unlikely event of a special session being called by a defeated president after an election). In general, however, a president's grip will be relaxed whenever it becomes known that he will not be a candidate for reelection. This was the experience, for example, of Theodore Roosevelt in 1906-08. In addition to the limitations imposed by election for a fixed term, presidential leadership sometimes suffers from the choice of a president not fitted for leadership (*e.g.*, Taft, Harding, and Hoover), and at all times encounters obstacles arising from the difficulty of maintaining a clear and honest line of demarcation between the president as party leader and the president as head of the government of all the people. During the famous "purge" of 1938, aimed at defeating in the primaries and elections Democratic senators and representatives who had opposed his measures, Franklin D. Roosevelt professed to be campaigning against the delinquents, not as president of the United States, but as "head of the Democratic party, charged with responsibility for carrying out its

mighty asset when that party has the votes on Capitol Hill to put through whatever measures the White House desires. But when it is the opposition party that has the votes—even in only one of the houses—leadership of a minority is of little avail. In such a situation, a president is forced back upon the arts of persuasion and compromise, with only the threat of veto and of appeal to the people to help him; and as a rule little can be accomplished.¹ There is no mystery about the fact that most great pieces of legislation are enacted in the first half of presidential administrations. To a degree, the explanation is, of course, that a new president (or even one newly reelected), coming into office with what he inevitably construes as a popular mandate in behalf of the policies which he and his party have espoused in the campaign, naturally turns promptly to getting those policies carried out. But a main reason is that if they are not carried out during the first two years, they probably cannot be carried out at all. For rarely is a president in as strong a position after the Congress which was elected with him goes out of office and the new Congress elected in the middle of his term comes in. His party will usually have a reduced majority in one or both branches; indeed, he is fortunate if he does not find the opposition in control of the House, perhaps also of the Senate. The patronage, too, will have lost much of its bargaining value, because nearly all of the important posts will have been filled. The time for a president to translate his party leadership into legislative performance is normally when party loyalty and spirit are running strong, and party votes are plentiful, as a result of victory at the polls. Later on, his leadership will probably have to be directed principally to repairing damage wrought by defeats, schisms, and other set-backs.²

2. The need of Congress for outside leadership

A second circumstance strongly favorable to presidential influence upon legislation is the need on Capitol Hill for leadership and direction from some outside source. Experience shows that Congress, when left to its own devices, tends to disintegrate into minority, partisan, and sectional elements and to flounder in a bog of contrary purposes. Even if there is capable and recognized leadership in the houses singly, there is usually no one save the president to bring the two branches together in effective support of great policies and measures. On plenty of occasions, senators

"principles"; and during the campaign of 1940 he labelled some of his speeches "political" and others "non-political" (those made during the campaign of 1944 being without exception frankly "political").

¹ A notable instance of an effort to handle such a situation was President Wilson's dealings with a Republican Senate in 1920, especially with respect to the Treaty of Versailles.

² The strengthened position of the Roosevelt Administration as a result of the sweeping Democratic victory in the elections of 1934 stands out as a notable exception to the foregoing observations. The elections of 1938 and 1942, however, yielding heavy Republican gains, ran true to form. On the first of these occasions, the Administration's previous majorities had been so overwhelming that, although now diminished, they remained fully adequate; on the second, the still heavier losses, combined with growing defection of Southern Democrats, left only majorities that were thin (at least in the House) and not too dependable. In half a century prior to 1938, the opposition party failed at mid-term elections to increase its representation in the House only once and in the Senate only four times.

and congressmen show resentment when exhorted, advised, or requested from "downtown"; yet when a new path is to be hewed, they almost invariably hesitate and show confusion until and unless a directing hand points the way and a commanding voice urges to action.¹ In other words, Congress works well only under stimulus and pressure, which may, of course, come ultimately from public opinion, or even from considerations of party welfare, but in any case usually needs to be transmitted or applied by the president.

Finally, there is the circumstance that, more and more, the people look to the president, not simply to coördinate and direct the national administration and to speak for the country in dealings with foreign governments, but to develop well-conceived lines of domestic policy, to propose the legislation necessary for carrying out such policy, and to exert enough pressure upon Congress to get this legislation enacted. They expect him, indeed, to "manage" Congress, and if through lack of political skill, or because of adverse circumstances too difficult to be overcome, he does not do so, they (justly or unjustly) pronounce him a failure. In other words, they regard him as "head of the government" (legislative branch as well as executive) and hold him responsible accordingly—a situation from which he draws grave perils but also high challenge and inspiring opportunity.

"The nation as a whole," once wrote a scholar who himself later attained the presidency, "has chosen him [the president], and is conscious that it has no other political spokesman. His is the only national voice in affairs. Let him once win the admiration and confidence of the country, and no other single force can withstand him, no combination of forces will easily overpower him. His position takes the imagination of the country. He is the representative of no constituency, but of the whole people. When he speaks in his true character, he speaks for no special interest. If he rightly interpret the national thought and boldly insist upon it, he is irresistible; and the country never feels the zest of action so much as when its president is of such insight and caliber. Its instinct is for unified action, and it craves a single leader."²

3. Popular demand for presidential leadership

¹ An excellent illustration is supplied by the stumbling fashion in which the Burke-Wadsworth Selective Service Bill of 1940 was handled. Unlike most important bills in later times, this one did not originate at the White House. Although known to favor it, "in principle," the President did not put himself squarely behind it, or exert himself actively in its behalf—with the result that, although the measure finally became law, Democrats who otherwise would have lined up pretty solidly for it and Republicans who would have felt it their duty to oppose it spent precious weeks in hedging, equivocating, and seeking safety first by doing nothing while awaiting a great light.

² W. Wilson, *Constitutional Government in the United States*, 68. "The power and prestige of the presidency comprise the most valuable political asset of the American people; they are, moreover, in a very true sense the creation of the American people." E. S. Corwin, *The President: Office and Powers*, 306. For an illuminating study of presidential leadership and of the unfortunate consequences when it is lacking (e.g., in years immediately following both the Civil War and World War I), see E. P. Herring, "Executive-Legislative Responsibilities," *Amer. Polit. Sci. Rev.*, XXXVIII, 1153-1165 (Dec., 1944).

A General View of Presidential Power

A hundred years of cumulative development

"The waters of democracy," to quote Woodrow Wilson, "are useless in their reservoirs unless they may be used to drive the wheels of policy and administration." And it is the experience of practically all democracies not only that leadership is the only means by which latent power can be turned to account, but that the requisite leadership can be supplied only by the executive. In Great Britain, Canada, and other countries having cabinet systems, this means the ministers; in the United States, it means the president. At the stage which our discussion has now reached, it must be sufficiently obvious that the salient fact about the presidency is its prolonged accumulation of power—by usage, by legislation, by judicial construction, in the enforcement of law, in the conduct of foreign relations and of war, in the use of the veto, and even in the shaping of public policy as controlled ostensibly by the legislative branch. The earliest chief executives, being "just about what the framers of the constitution expected the incumbents of the office to be,"¹ took a comparatively modest view of their own authority. Jackson, however, brought to the White House not only a resolute disposition, but an impatience with restrictions and conservative traditions which was characteristic of the section from which he came and of the generation in which he lived. In his hands, the presidency became a far more potent instrumentality than before; and although after his day the office had its ups and downs, as it passed from stronger to weaker hands and back again, and as the times demanded of the chief executive a vigorous rôle or permitted a more passive one, hardly any later incumbent ever willingly gave up a particle of power once successfully asserted. On the contrary, every fresh advance became, in turn, a point of departure from which still more exalted claims to authority were projected; and under Franklin D. Roosevelt, notwithstanding occasional set-backs, a peak was reached which overtopped all that went before.²

Basic factors involved

The reasons for this extraordinary development are not to be found in motivations springing from personal ambition and aggrandizement. Most of the presidents, being human, have found pleasure in the exercise

¹ W. B. Munro, *The Government of the United States* (rev. ed.), 130.

² Except, of course, special wartime powers of a manifestly temporary character; and even in this general domain, most powers acquired have been retained.

³ In the opinion of Professor Edward S. Corwin, about one in three of the thirty-one individuals who have held the presidency have contributed to the development of its powers. Washington, Jefferson, Jackson, Polk, Lincoln, Hayes, Cleveland, Wilson, and the two Roosevelts form his suggested list. *The President: Office and Powers*, 29. The opening chapter of the volume cited presents an excellent analysis of the varying conceptions of the presidential office that have been held; see also pp. 309-316. In the seventies and eighties of the last century, the presidency suffered a noticeable sag, which is reflected interestingly in Woodrow Wilson's *Congressional Government* and James (later Lord) Bryce's *American Commonwealth*, published in 1885 and 1889, respectively. Henry Jones Ford's *Rise and Growth of American Politics* and Woodrow Wilson's *Constitutional Government in the United States*, published in 1898 and 1908, respectively, portray the office as once more decidedly on the up-swing.

of authority; but few, if any, have coveted power for its own sake. Presidential preëminence has reached its present proportions for a number of obvious reasons. One is the development of what is to all intents and purposes direct popular election, giving the chief executive a rightful claim to be regarded as no less a spokesman of the national will than is Congress. Another is the vast expansion and progressive centralization of governmental functions characteristic of the past half-century. A third, overtopping even the foregoing, is the oft-demonstrated, ever-growing, and increasingly imperative need for the leadership and direction—in legislation and in general policy-framing—which in a cabinet system are exercised preëminently by the prime minister, but for which our system makes no provision—a need which there is no possible way of meeting except through the president. A contributing factor of tremendous importance has been, of course, a succession of great national crises—the Civil War, World War I, the depression of the thirties, the perilous international situation created by the Nazis and Fascists, and finally World War II, all of them inevitably making national leadership a top-most concern and forcing executive power to new levels.

Plenty of people do not like what has been going on; and there is no denying that the balance contemplated by the makers of the constitution has been to a considerable extent upset. Even in Jefferson's day, the ugly charge of dictatorship was hurled in the president's direction; Jackson, Lincoln, the first Roosevelt, and certainly the later Roosevelt, incurred similar criticism. To speak particularly of our own time, those who take the attitude indicated would, however, have great difficulty in showing how important things needing to be done could be done otherwise than through presidential initiative, direction, and drive. They would have to admit, too, that many of the powers complained of have been expressly voted to the chief executive by the people's representatives in Congress, and could be recalled by the same authority that granted them. And, whether or not they could be convinced, the fact remains that strong and unified government does not necessarily mean arbitrary government, nor a powerful chief executive a dictatorial one. Despite all, the president is still a responsible servant of the people; and such he will remain as long as the ultimate popular and congressional controls inherent in our representative system endure.¹

The
president
not a dic-
tator

¹ The special subject of presidential powers under the impact of wartime conditions will be considered in a later chapter (see pp. 664-670 below).

The fullest and most authoritative recent analysis of presidential powers will be found in E. S. Corwin, *The President: Office and Powers*, Chaps. III-VII (pp. 297-308 especially on "dictatorship"). Cf. L. Rogers, "The American Presidential System," *Polit. Quar.*, VIII, 517-529 (Oct.-Dec., 1937); "The Increasing Power of the President" [Symposium], *Cong. Digest*, XII, 257-288 (Nov., 1933). See also materials presented in J. E. Johnsen [comp.], *Increasing the President's Power* (New York, 1934).

Control Over the President by Congress

Direct
constitu-
tional
limita-
tions

The emphasis thus far placed upon the president's lofty rôle must not be allowed to obscure the fact that, as between executive and legislature, influence and control do not flow in only a single direction; for the president, in his turn, is subject to considerable restraint, and in the final analysis to a good deal of positive control, from Congress. Few indeed of his powers can be exercised without spending money; and for money he is absolutely dependent upon Congress. Few, likewise, can be exercised except through departments, boards and other agencies, for the establishment and maintenance of which he is similarly dependent. For enactment of the legislation he desires, he must rely upon Congress. He must get senatorial consent to his appointments and his treaties. He can wage war only if Congress declares it. His vetoes can be overridden in the two houses. His every act (personal or through subordinates) can be looked into and criticized, and some of them can be reversed. If worst comes to worst, he can be impeached and removed from office.

Practical
checks

In the give and take of personal relations with senators and representatives, furthermore, he may be argued into changing his views or modifying his policies. Defeat of his measures or refusal of his requests may compel him to give up a program in which he firmly believes; witness Franklin D. Roosevelt's enforced relinquishment in 1937 both of his favorite plan for administrative reorganization and of his cherished project for reconstruction of the Supreme Court, his reversal in 1943 on a \$25,000 ceiling for salaries, and the involuntary abandonment, in the same year, for lack of funds, of two agencies dear to his heart, the National Resources Planning Board and the National Youth Administration. Either house, or both, may make "requests" (not—at least in form—demands) upon him for documents or information which he cannot well withhold, however much he might prefer to do so,¹ or may institute investigations of executive or administrative work for which he is directly or indirectly responsible.² Congress may pass laws imposing new duties upon him or his subordinates, and may limit the discretion of heads of departments or other officers and require them to do given things in a given way, irrespective of the president's wishes. Even a supposedly friendly Congress may flout the Administration's policy again and again during a session, the Senate, in particular, being prone to assume an attitude best described as "baiting the president."³

¹ Such requests, when relating to the negotiation of treaties or to other aspects of foreign relations, usually recognize the necessity of discretion in this domain by incorporating the phrase, "if not incompatible with the public interest."

² See p. 402, note 1, below.

³ Practically all of the matters referred to in this paragraph have been, or will be, discussed elsewhere, and hence are merely mentioned here.

Proposals for Bringing the Executive and Legislative Branches Closer Together

At most, however, the checking and obstructive powers of Congress in the various directions mentioned are mainly of a negative nature; Congress can block—it cannot itself take over and execute. And this may mean an *impasse*, a *paralysis* of action, which can hardly arise under a cabinet form of government (or in any event can be quickly overcome), but with which we are unpleasantly familiar under our presidential form—a form under which, notwithstanding closer relations in many ways than the makers of our constitution envisaged, executive and legislature still are frequently found occupying “two islands of separate and jealous power.” Out of a vast amount of discussion of the dilemma in which this often involves us have come a variety of suggestions looking to bridging the chasm between the two branches; and the present chapter may appropriately close with a word concerning certain of them.

One proposal is that, with the president continuing to appear before Congress only to present messages, the heads of executive departments be extended the privilege of the floor in both houses for the purpose of giving information, answering questions, and engaging in general debate. As civil officers of the United States, department heads are ineligible to membership in either house. But for the purpose in view, it would not be necessary to make them members. Already they are sometimes seen mingling with senators and representatives in the corridors and cloak-rooms of the Capitol. With increasing frequency, too, they appear before congressional committees to supply information, answer queries, or urge the passage of bills in which the Administration is interested. Would it not be better, it is asked, to give the entire membership of either house, or of both houses, a chance to hear what they have to say and to question them in the same direct manner in which ministers are questioned in the British House of Commons? ¹

1. By giving heads of departments the privilege of the floor in Congress

¹In the First Congress, it is interesting to observe, department chiefs not only appeared on the floor of both houses, but took part in debate. The practice died out, however, and numerous attempts in later periods to revive it proved unavailing. A history of proposals on the subject through more than one hundred years, and an able presentation of the favorable arguments, will be found in 63rd Cong., Spec. Sess. of Senate, Sen. Doc. No. 4, *Privilege of the Floor to Cabinet Members; Reports Made to the Congress of the United States* (1913).

In October, 1913, Congressman Estes Kefauver of Tennessee introduced in the House of Representatives a resolution amending the rules of the House to provide that on at least one day in every two weeks, heads of departments and independent agencies should appear in the House by request to answer orally written and oral questions propounded by members—such question period to occur not oftener than once a week and to consume not more than two hours. The proposal won hearty support from younger members and in the press, but was frowned on by the House leadership, and has not appeared to stand much chance of adoption. Interest in the plan was whetted by Secretary Hull's contemporary appearance, by invitation, before the House and Senate, meeting jointly, to give a confidential report on the results of an international conference at Moscow in which he had participated. The occurrence was noteworthy, because never before had a cabinet member addressed Congress in formal session. But of course it was not the sort of thing contemplated in the Kefauver resolution. See E. Kefauver, “The Need for Better Executive-Legislative

2. By selecting them from the membership of Congress

A more radical plan, which had the support of President Taft, would be for the president, in selecting his heads of departments, to take them, or at least some of them, from among the members of his party in Congress, the persons so designated remaining members of the legislative branch, entitled as such not only to participate in debate but to introduce bills, to serve on committees, and to vote. This would be a step nearer to the cabinet system, yet a long way short of it, since the president's constitutional position would not be changed and his cabinet members, functioning also as senators or representatives, would continue to enjoy fixed legislative terms.

3. By insuring priority for Administration measures

The plan just mentioned might be expected to put the executive in a better position than now to secure favorable consideration for the increasing numbers of significant bills which it initiates. Why not, however, —some inquire—frankly accept the fact that most public bills of major importance now come to Capitol Hill from the other end of Pennsylvania Avenue (the legislative success of a session largely depending, too, upon the fate of these measures), and, by suitably amending the rules of the two houses, definitely guarantee Administration bills the same right of way as against all others that Government bills enjoy under the British system? If executive leadership in legislation is inevitable, and desirable as well, why not freely and wholeheartedly clear the way for it?

4. By adopting a cabinet system outright

Finally, there are people who would have us go the entire distance, discard the separation of executive and legislative branches decreed by the constitution, and completely displace presidential with cabinet government. Under this program, an elective president might continue as nominal head, but (1) the working executive would be a cabinet, presided over by a "premier"; (2) the Senate would be reduced to some such secondary rôle as that played by the British House of Lords; (3) the premier and other cabinet members would be chosen only from the House, to which they would be "responsible"; (4) if the confidence of the House majority were lost, the cabinet ordinarily would resign; although (5) if it should prefer to try its fortunes with the country in a general election, it could bring about a dissolution of the House, whose members would have a maximum, but no guaranteed, term of four years.¹ And in this way our system would be converted into something, in form at least, like the British.²

Teamwork in the National Government," *Amer. Polit. Sci. Rev.*, XXXVIII, 317-325 (Apr., 1944); W. P. Armstrong, "The Kefauver Resolution," *Amer. Bar Assoc. Jour.*, XXX, 326-329 (June, 1944). The Kefauver proposal was reintroduced in the House of Representatives in January, 1945.

¹ Such, at all events, is the plan as outlined by one of its recent and ardent exponents, H. Hazlitt, in his *A New Constitution Now*, Chaps. v-viii.

² It must not be supposed that the foregoing represent all of the proposals that have been made. Readers of R. Young's *This Is Congress* (New York, 1943), and A. Heymeyer's *Time for Change* (New York, 1943) will find interesting suggestions for tying the executive and legislative branches together through the medium of a "legislative cabinet" and a "joint council," respectively. And numerous other proposals are made in *The Reorganization of Congress; A Report of the Committee on Congress of the American Political Science Association* (Washington, D. C., 1945).

For the plan of bringing heads of departments into the sittings of the two houses—at least to answer questions, if not to engage in general debate—there is much to be said. It is true that most of the legislative work of Congress is done, not on the floor, but in committees, where department chiefs and other higher administrators already appear with increasing frequency. It is true, also, that even the proposed question-period would be liable to abuse through the injection of queries designed only to embarrass and to make political capital. But there are occasions—many of them—when it would be highly advantageous for the entire membership of one or both of the houses to receive first-hand information directly from the administrators. As British experience shows, there are ways of screening the questions asked (at least the written ones) so as to prevent time being consumed with queries that are irrelevant or merely partisan. The administrators, on their part, would be afforded opportunity to get clearer notions of what Congress meant when passing a law, to explain the difficulties and problems that have arisen in carrying it out, to answer charges made against them, and to justify their policies. Not least important is the consideration that the plan could be adopted by simple revision of the rules of the two houses.

Merits of
the pro-
posals

The proposal that heads of departments be at the same time members of one branch of Congress or the other raises more doubts. To begin with, a constitutional amendment would be required. And if this hurdle could be surmounted, there would still be the rather anomalous position in which a president—retaining his present constitutional powers and prerogatives, yet surrounded by chief agents and advisers whose political fortunes were more or less independent of his own—would find himself. In so far as the plan would make for greater harmony between the executive and legislative branches, it doubtless would prove advantageous. But there is no clear guarantee that it would do this.

As for the proposed priority for Administration measures, the first fact to be noted is that when the Administration is supported by a working majority in the two houses, it even now can count, with great assurance, upon highly preferential treatment for its bills; a second is that when it commands no such majority, its bills are not likely to prevail in any case; and a third is that, so long as Congress clings to its constitutional, and still important, right of legislative initiative, it will certainly not be willing to tie its hands by any general rule relegating measures under its own sponsorship to the notoriously unfavorable position from which private members' bills suffer in the Government-led and Government-controlled House of Commons at Westminster.

Adoption of an outright cabinet system is an interesting subject for thought—wishful or otherwise. But no sensible person supposes that our people are prepared for so drastic a step in the foreseeable future; and even if they were, it does not follow that cabinet government would work as well here as in countries having different traditions. More than a

hundred years of almost imperceptible growth were required to bring the system to maturity in the land of its birth.¹

After all, it must be remembered that we already have executive leadership in a large way, at all events when we have a president capable of, and bent upon, exercising it; the country since 1933 has seen how, in times of stress, that leadership can, under our present arrangements, be exalted to heights almost, if not fully, equal to those attained under the British system. Undeniably, our government creaks and groans under the burdens and responsibilities that have been thrown upon it; plenty of improvements in it are still possible. But other governments, differently constituted, creak and groan also; and people who clamor for a change in the fundamental principles on which our system is based have yet to make out a convincing case.

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¹ A quick change-over to the cabinet system is advocated in the recent book by H. Hazlitt mentioned above and in W. MacDonald, *A New Constitution for a New America* (New York, 1921). Even if such a step were practicable, it would be at the sacrifice of at least one very great asset of our present system, i.e., the presidency as a unifying and energizing force in our national life. Removing the presidency as the focal point in our national politics, it also would tend to open the way for fragmentation and sectionalization of political parties, with all the disadvantages accruing from a multi-party system.

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CHAPTER XXI

NATIONAL ADMINISTRATION—AGENCIES AND FUNCTIONS

The Nature and Importance of Administration

Politics
and ad-
ministra-
tion

Government in action is reducible to two basic processes: (1) the framing of policy and (2) the carrying of policy into effect—the first essentially a matter of politics, the second one of administration. By “politics” is meant, of course, a great deal more than mere party conflict. Included in it is the birth and growth of ideas, the development of principles, the formation and expression of opinion, the organization and techniques of parties, propaganda, electoral procedures, and legislation—in short, the entire range of activities and processes through which ideas crystallize into policies and policies are translated into law. By administration is meant the processes and procedures by which policies laid down in statutes, rules, orders, and the like are made operative, the business and “housekeeping” activities of government are carried on, and the personnel requisite for performing such work is recruited, assigned its tasks, disciplined, and directed. Policy-making is concerned primarily with ends or objectives; administration, with means and techniques. To be sure, even in a democracy and under a system of separation of powers, the agencies performing the two great functions indicated are not walled off rigidly from each other; on the contrary, they are firmly meshed together. In our national government, Congress is presumed to be the supreme policy-making authority; yet it creates much of the machinery of administration, provides the money for maintaining it, prescribes administrative duties and sometimes methods, and in so far as it likes investigates and criticizes results—although it does not itself, and cannot, *administer*. In their turn, the administrators supply information, develop plans, submit proposals, assist in drafting, and in other ways contribute directly and heavily to the work of legislation—so heavily, indeed, that the complaint is sometimes heard that Congress and other legislatures have abdicated their most important task, that of deciding policy. The president, too, is a major connecting link between politics and administration. The basic bifurcation of function referred to nevertheless exists, and every intelligent student of our system of government must begin by recognizing it.

The im-
portance
of admin-
istration

There must be recognition, too, of the high importance of administration in the governing process. Less than sixty years have passed since Woodrow Wilson pioneered with the earliest systematic discussion of

this matter in any language.¹ But subsequently, and especially since about 1920, administration, on all levels of government, has come in for vastly increased attention, having, indeed, become of itself a major field of research, instruction, and experiment.² After all, notwithstanding its long neglect, administration is, as Wilson emphasized, "the most obvious part of government"; it is, as he bluntly added, "government in action." Certainly it is administration that day by day brings government closest home to the people. Congress may deliberate through long months in Washington (likewise a legislature in a state capital) and enact laws by the score without touching the citizen or his pocketbook unless these laws are applied and enforced throughout the length and breadth of the land by administrative authorities.

It is, indeed, the quality of administration that mainly conditions the effectiveness of the democratic process; democratic government means democracy in administration—the gearing of administrative machinery to the liberal principles underlying the state—no less than democracy in legislation. To no small degree, the ill-fated Weimar Republic in Germany proved a failure for the reason that an ostensibly democratic constitutional system was clogged and frustrated by administrative machinery still pervaded by the aristocratic, officious, and arbitrary attitudes characteristic of the old Imperial régime—an administrative mechanism frequently admired abroad for its technical efficiency, but lacking in the most essential aspect of all, i.e., conformity with the democratic principles on which the government as a whole was supposed to be based. Even where, as in the United States, administration is, on the whole, permeated with the democratic spirit, the character of government, as a going concern, still depends heavily on administrative quality and capacity. Good laws are, of course, desirable, and justice through the courts is indispensable. But it is easier to get good laws and impartial court decisions than to secure uniformly economical and efficient administration. The legislature has only to declare its will in an act of broad and general scope, and thereupon its work is finished. The real task remains—to fit the terms of the measure to the existing public situation; to select the officials who are to interpret the law and apply it; to instruct, supervise, and discipline these officials; to settle innumerable questions of detail (many of them highly technical, many involving important matters of principle); to prevent laxity, favoritism, and fraud. It has been an American failing to assume naïvely that all that is necessary in order to achieve a desired end is to "pass a law." As a people, we are only beginning to understand that, even when a law is well conceived and in good form, the vital test comes in the administering of it. Such administration

¹ "The Study of Administration," *Polit. Sci. Quar.*, II, 197-222 (June, 1887).

² Growing recognition in this country of the importance of administration was reflected in the formation, in 1939, of a national Society for Public Administration, whose quarterly journal, the *Public Administration Review*, should be known to all students of the subject.

is no mere mechanical process, but, on the contrary, a very human affair, coming close to the people, and dependent for its success quite as much upon the people's attitudes and reactions as upon the competence and diligence of the administrators themselves. By its very nature, too, administration must be in action all of the time, day and night, fifty-two weeks a year. Congress sometimes goes a good many months without a meeting, and the courts are accustomed to lengthy recesses between terms. Administrative management, however, must be kept up ceaselessly; individual administrators may take vacations, but administration is never adjourned.

Growing
magnit-
ude and
complex-
ity

Whether in nation, state, or city, the work of administration tends to grow ever more varied, complicated, and exacting. Government stretches its regulating arm in new directions, adding every time that it does so to the activities to be carried on or supervised by its agents. Technological advances continually introduce new elements of complexity into the tasks to be performed. Ill-equipped to make provision in detail for the application of principles and policies embodied in the laws which they enact, legislatures increasingly leave it to administrative authorities to supply rules and regulations as necessity arises, thereby imposing upon them heavy responsibilities of a quasi-legislative character. Such authorities, too, are steadily acquiring powers to adjudicate complaints and disputes arising out of their administrative acts. All of these tendencies were strikingly in evidence long before the coming of the New Deal, when, as will appear below, programs of recovery and reform were undertaken on lines such that, for the time being, government seemed almost wholly a matter of administration. In the later thirties, there was some recession; at all events, the legislative branch of government recovered some of its earlier prominence and independence. After 1940, however, large-scale defense preparations opened new avenues for administrative expansion; soon participation in a global war made government once more mainly a gigantic administrative enterprise; and, whether for the immediate postwar years of difficult readjustment or for the longer term stretching ahead, administration gives no promise of yielding the center of the governmental stage.¹

¹On the general subject of administration as a function of government in the United States, see C. E. Merriam, *On the Agenda of Democracy* (Cambridge, Mass., 1941), Chap. II; M. E. Dimock, *Modern Politics and Administration* (New York, 1937), Chap. XX, and "The Study of Administration," *Amer. Polit. Sci. Rev.*, XXXI, 28-40 (Feb., 1937), Professor John M. Gaus has suggested that an illuminating commentary on the growth of public administration, and of attitudes toward it, in this country is supplied by four essays, widely separated in time and circumstance: (1) Henry Adams, "Civil Service Reform," *No. Amer. Rev.*, CIX, 443-475 (Oct., 1869); (2) Woodrow Wilson, "The Study of Administration," *Polit. Sci. Quar.*, II, 197-222 (June, 1887), reprinted in *ibid.*, LVI, 481-506 (Dec., 1941); (3) C. A. Beard, "Administration in a Great Society," *American Government and Politics* (4th ed., New York, 1924), Chap. III; and (4) L. D. White, "Public Administration," in *Encyclopaedia of the Social Sciences* (New York, 1930), I, 440-450. See J. M. Gaus, "The Present Status of the Study of Public Administration in the United States," *Amer. Polit. Sci. Rev.*, XXV, 120-134 (Feb., 1931). Cf. D. M. Levitan, "Political Ends and Administrative Means," *Pub. Admin. Rev.*, III, 353-359 (Autumn, 1943).

Some Fundamental Features of the National Administrative System

By tradition, and still as a general practice, the national government maintains its own nation-wide force of officials and employees, making no such widespread and habitual use of state functionaries as has been common in Germany (prior to the Nazi régime), Switzerland, and some other federally organized countries. To be sure, federal elections are managed by state officers acting under state law, and state courts naturalize aliens under national law. Offenders against national laws have always been apprehended by state and local police, as well as by marshals and other federal agents; state officials were drawn deeply into the enforcement of the Volstead Act when national prohibition was in effect; the Soil Conservation and Domestic Allotment Act of 1936 is administered through state and county committees, though federally appointed; local officials are sometimes commissioned to help enforce federal pure food and drugs acts, the plant quarantine law, and public health measures; and the recent defense effort and war have seen federal selective service legislation carried out largely through state and local agencies, and state and local defense councils used extensively by all the defense and war agencies of the federal government—for example, by the Office of Price Administration in the rationing program. Some people think that the states may end by becoming hardly more than administrative areas and agencies of the government at Washington. Despite all that has happened, however, the national government is still fundamentally self-sufficient in the sense that its laws are carried out and its other work done mainly by its own separate administrative personnel.

The machinery of administration is organized primarily in or under a series of coördinate executive departments¹ created by act of Congress. The constitution does not provide in so many words for departments, nor of course say how many there shall be or what they shall be called. It, however, plainly assumes that departments will exist: it authorizes the president "to require the opinion, in writing, of the principal officer in each of the executive departments"; it also empowers Congress "to vest the appointment of inferior officers in the heads of departments." Beginning, in an important way, with the creation of the Civil Service Commission in 1883 and of the Interstate Commerce Commission four years later, important agencies standing outside of the departments, and hence commonly referred to as "independent establishments," multiplied until even before the launching of the Roosevelt Administration's recovery program in 1933 their number had reached a score or more; and the New Deal gave rise to a long list of additional ones, many of

1. The national government's separate administrative machinery

2. Executive departments; independent establishments; civil service

¹ Even in official usage, the terms "executive" and "administrative" are employed very loosely. In the strictest sense, the president and vice-president are the only executive officers in the national government; the departments, and even the heads thereof, are administrative. As being attached to the executive branch of the government, however, the departments are known as "executive departments," and the civil service as the "executive civil service."

which, in one form or another, survive today. Many, too, have been brought into existence during the present war. In numerous instances, however, these "independent" agencies are occupied only incidentally, if at all, with tasks of a strictly administrative nature; and the great burden of administrative work is still carried by the ten departments thus far set up—State, Treasury, War, Navy, Post-Office, Interior, Justice, Agriculture, Commerce, and Labor—together with "the men [and women too] in the trenches," *i.e.*, the host of lesser officials and employees, attached for the most part to one of the departments, and constituting the "executive civil service." Speaking broadly, Congress creates not only the departments and independent establishments, but also the divisions, bureaus, services, and other administrative or investigative units set up within them. Minor agencies, however, may be established by executive order; and, as we shall discover, the president has on certain occasions been empowered by Congress to make changes affecting almost every aspect of the machinery except the number and identity of the departments themselves.

3. Common features of departmental machinery

Going from one great department to another in Washington, one would find plenty of variation in structural arrangements, arising partly from dissimilarity of work to be performed, partly from the as yet unfinished reorganizations undertaken in recent years, partly, too, from the flexibility and capacity for quick readjustment made necessary by the very nature of administration, *i.e.*, the employment of means (which must be readily adaptable) to prescribed ends (which themselves may also change). Nevertheless, there are also common features. To begin with, all of the departments are organized under single heads. Boards and commissions are employed in most of the independent establishments, and are widely used in state governments. But every national department is presided over by a single official, known in all cases, except for the attorney-general and the postmaster-general, as a "secretary." Furthermore, nearly all of the departments have from one to four assistant secretaries and a chief clerk; and seven (State, Treasury, War, Navy, Commerce, Interior, and Agriculture) have also an under-secretary. Assistant secretaries are usually in charge of specific groups of departmental agencies and functions; the under-secretary (when there is one) is more on the order of a general sub-head, relieving the pressure upon the secretary and on occasion acting as his substitute. Like their chiefs, assistant and under-secretaries have traditionally been political appointees, serving only so long as the president who chose them remained in the White House.¹ There have been instances, however, of appointees con-

¹ In Great Britain, the permanent under-secretaries in the executive departments are non-political, hold office during good behavior, and furnish an extremely useful element of continuity in the topmost levels of administration. As indicated above, the under-secretaryships at Washington are of quite a different nature. They may eventually develop on the English pattern, and it would be advantageous if this were to happen.

tinuing in office through several administrations, the most notable being that of Alvey A. Adce, who achieved the extraordinary record of serving as an assistant secretary in the Department of State from 1882 until his death in 1924.

It goes without saying that in every department the work to be done is parcelled out among numerous divisions or branches. Here, however, one begins to encounter wide variation, and sometimes confusion. Created at long intervals through more than a hundred years, and never developed in accordance with a definite plan, the departments naturally give little evidence of symmetry and logic. One encounters divisions, bureaus, offices, and services, headed by commissioners, directors, comptrollers, chiefs. But there is no fixed hierarchy—no established meaning for most of the terms employed. One thing important to observe is that, however extensively the heads of the great departmental bureaus or similar divisions have in times past been appointed and removed on political grounds, there has been notable advance toward acceptance of the principle that such officials should be selected on grounds of fitness and, even when originally appointed for political reasons, should be left undisturbed as long as they give good service. To them it falls, in particular degree, to keep the individual administrative services going and to supply the needed continuity of knowledge and experience. Twenty years ago, a student of the subject was able to show that in several of the major departments—especially those, like Agriculture, which carried on work of a technical and scientific character—most bureau chiefs (or their equivalents) enjoyed substantial permanence of tenure;¹ and, notwithstanding occasional lapses, the situation is more favorable today, not so much because of civil service requirements as because the increasingly complex and technical nature of nearly all governmental operations makes it, almost from year to year, more obviously absurd and impossible to intrust bureau chiefships and similar positions to mere office-seekers.²

In all of the departments (and usually in independent establishments too), one will find branches designed for the performance of two distinct types of functions: (1) "overhead" functions, having to do with the personnel, equipment, funds, and other means by which the department's work is carried on—a matter essentially of departmental housekeeping—and (2) "direct service" functions, having to do with the actual services rendered the public. To cite a single illustration: in the Department of Agriculture, the Office of Personnel, the Office of Finance, and the Office of Plant and Operations perform overhead functions; while the Forest Service, the Bureau of Agricultural and Industrial Chemistry, and the Bureau of Animal Industry perform functions of the direct-service variety. Needless to say, its direct-service functions constitute a depart-

4. Types
of func-
tions

¹ See references to articles by A. W. Macmahon, p. 418 below.

² The organization of all of the departments will be found outlined in any recent issue of the *U. S. Government Manual*.

ment's sole reason for existence; all others are only means to an end.

By its nature, administration is the work of subordinates; even the heads of departments are subordinate to the president. Consequently, all administrators are subject to control from some source. In point of fact, members of the national administration are subject to control from a number of sources. To begin with, they are controlled by and responsible to their immediate superiors; and this applies to heads of departments no less than to every one else. Under cabinet systems, department chiefs, as ministers, are responsible to the popular branch of the legislature. But not so under our presidential system; here, whatever such officials do is considered as done by the president; he takes responsibility for their acts before Congress and the country, and, fortified with the power not only of direction but of removal, he naturally will hold them answerable directly to himself. At the same time, Congress also has a place in the picture, because, after all, it not only has set up the departments and most other agencies, but has fixed their duties and functions; and, defined in this way by law, such duties and functions are normally beyond the power of the president to curb or countermand—except in so far as he may take the dubious course of neglecting or refusing to see that they are performed. Congress, furthermore, controls through the power of the purse, through its right to demand reports and conduct investigations, and, in extreme cases, through its power of impeachment.¹ Finally, there

¹ Not all congressional investigations have to do with the conduct of administration; and of those so centered, some (especially if sponsored by a friendly Congress) may be intended to vindicate or otherwise serve, rather than to harass or embarrass, the agencies affected. For a variety of reasons, including its continuity and the greater independence of its members, the Senate is responsible for the majority of inquiries undertaken; although—as illustrated by an extensive investigation of the National Labor Relations Board completed in 1940 and by a protracted inquiry into subversive influences (in government circles and outside) carried on by the Dies Committee to Investigate Un-American Activities—the House has of late entered the field more actively. So great was the wartime impetus to congressional investigations that in 1943 the Senate had twenty-one special committees of inquiry at work and the House ten, often duplicating each other's efforts or otherwise poorly coordinated. Most useful among the number were a Senate Committee to Investigate National Defense, headed by Senator (now President) Harry S. Truman, and a House Committee on National Defense Migration, headed by Representative John H. Tolan, both credited with much constructive work in behalf of efficient preparation for and conduct of the war. It is to be observed, too, that standing committees in both Senate and House often carry on investigations through sub-committees.

Three standard works on the general subject are E. J. Eberling, *Congressional Investigations* (New York, 1928); M. E. Dimock, "Congressional Investigating Committees," *Johns Hopkins Studies in Hist. and Polit. Sci.*, XLVII, 1-182 (1929); and M. N. McGarry, *The Development of Congressional Investigative Power* (New York, 1940). Cf. G. B. Galloway, "The Investigative Function of Congress," *Amer. Polit. Sci. Rev.*, XXI, 47-70 (Feb., 1927); H. L. Black "Inside a Senate Investigation," *Harper's Mag.*, CLXXII, 275-286 (Feb., 1936); M. N. McGarry, "Congressional Investigations During Franklin D. Roosevelt's First Term," *Amer. Polit. Sci. Rev.*, XXXI, 680-695 (Aug., 1937); and L. W. Kocnig, *The Presidency and the Crisis* (New York, 1944). Chap. v, dealing with congressional investigations during the present war.

On congressional control over administration through the medium of finance, see A. W. Macmahon, "Congressional Oversight of Administration: The Power of the Purse," *Polit. Sci. Quar.*, LVIII, 161-190, 380-414 (June and Sept., 1943), and L. Wilmerding, *The Spending Power; A History of the Efforts of Congress to Control Expenditures* (New Haven, 1943).

is a possibility of control also by the courts. The general principle is that when an administrative officer is carrying out a provision of law which manifestly leaves room for discretion, he is performing a political act and cannot be called to account for it in a court, but that, on the other hand, when a duty or action is so defined by law as to allow no latitude for choice, it is *ministerial* and subject to judicial review. As compared with administrators in the departments, independent establishments (some of which, as has been observed, are only incidentally administrative, or not such at all) sustain somewhat varying, and even uncertain, relationships. Some are clearly responsible to the president; others, rather to Congress; still others are more or less answerable to both; and the confusion that sometimes arises at this point furnishes one of the arguments occasionally employed against the multiplication of such bodies.

Department Heads as Administrative and Advisory Officers

Rather than inject a wearisome catalogue of departments and independent establishments here or at any other point in this book, our plan will be to call attention to the organization and functions of the more important ones when later discussing such topics as foreign affairs, finance, defense, commerce, agriculture, and labor. It will be helpful, however, at the present point, to take note of some principal tasks and duties which heads of departments have in common—apart from their cabinet membership, which has been touched upon in another place.¹

To begin with, the great bulk of subordinate officials and employees in the departments are appointed, directly or indirectly, by the department heads—acting, of course, as always, in the president's name. One must hasten to add that by far the larger proportion of the positions filled in this way have now been placed in the classified service,² which means that the appointments must be made under the restrictions laid down in the civil service laws and regulations. This, of course, greatly narrows the appointing officer's discretion and leaves him with relatively little "patronage" of a strictly political character. The power is, nevertheless, an important one; and with it goes a power of removal, likewise restricted, to be sure, by civil service regulations, yet also decidedly substantial.

Subject to the supreme directing power of the president and to varying amounts of control by Congress (and, if the truth be told, by more experienced and often better informed subordinates), each department head guides and supervises the work of all bureaus, divisions, offices, and other agencies in the department under his care. How much he will himself be directed by the president will depend upon circumstances, *e.g.*, how strongly disposed a given president may be to assert himself, how much confidence the president has in the secretary's capacity and judg-

1. Appointing and removing subordinates

2. Directing the work of the department

¹ See pp. 344-349 above.

² See pp. 422-426 below.

ment, and the degree to which decisions of major importance are required by special conditions existing at a given time. But in any event it falls to the department head to wield a general power of direction and control (including discipline) over the branch of administration intrusted to him, as also to represent the department's interests in procuring appropriations, additional personnel, increases of pay, and better working conditions.

3. Issuing rules and regulations

Another highly important function is that of issuing rules and regulations. The far-reaching and ever-expanding ordinance power of the president has been commented on in another connection.¹ In many instances, however, administrative regulations pursuant to this power are prepared in the departments and promulgated in their name, or even in the name of a bureau or division. Good examples include the voluminous regulations under which the postal service is carried on and patents granted. Indeed, each department head is authorized by statute "to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it," and also to make rules appropriate for securing proper examination of accounts. Furthermore, broad regulatory powers covering weighty matters have been conferred on particular department heads, bureau chiefs, and the like, as well as upon commissions and other agencies outside of the departments. For example, the secretary of the treasury has been authorized to prescribe regulations for enforcing the customs and internal revenue laws, and for ferreting out the counterfeiting of the currency of the United States; and the secretary of agriculture has been authorized to make rules governing the importation and interstate movement of animals and plants, the protection of forest reservations and of migratory birds, and the execution of acts of Congress relating to meat inspection. The reasons for the remarkable growth of "subordinate," or "administrative," legislation in the departments and independent establishments are, of course, similar to those accounting for the steady widening of the ordinance power of the president himself—boiling down to the sheer inability of Congress, when legislating, to anticipate and provide for the thousand and one detailed situations that have to be met when a law is being brought home to the people in terms of day-to-day enforcement.²

4. Deciding appeals

Still another important thing that the department head has to do is to decide disputes arising out of the acts of his subordinates. In the administration of the laws governing such matters as immigration, conservation, the postal service, taxation, and social security, great numbers

¹ See pp. 362-366 above.

² On the general subject, see F. F. Blachly and M. E. Oatman, *Administrative Legislation and Adjudication*, Chaps. II-IV.

of controversies inevitably develop. Persons affected adversely may feel that an official has exceeded his powers, or that he has reached a decision not warranted by the facts in the case; and fairness demands that opportunity be afforded for a reconsideration of the decision or action. Conceivably, all such questions might be carried to the courts. But the federal Supreme Court itself has explained that, while appeal to the courts is proper enough when the construction of a statute is involved, such appeal, if permitted in the multitude of disputes arising out of the ordinary field operations of the departments, would so swamp the courts as to "entail practically a suspension of some of the most important functions of government."¹ Hence, except when decision hinges upon an interpretation of law, appeal normally lies only to higher administrative officials or boards, including in the later stages the heads of departments; and in many kinds of cases—for example, appeals against closure of the mails to persons and concerns alleged to be engaged in fraudulent transactions—the verdict of the department head is final, although in a limited number there is appeal to the president himself. "Administrative adjudication" on these lines comes in for a good deal of criticism from people who consider that functions of a judicial nature ought to be performed only by courts. Like administrative legislation, however, it is not only inevitable, but, under suitable safeguards, proper.²

The statutes creating the State, War, and Navy Departments expressly made the heads of those establishments responsible to the president; those creating the Treasury and Interior Departments did not do this, specifying rather that the department head should "report" to Congress. Manifestly, the first-named departments are more immediate organs of the president in carrying out his constitutional functions than are the others. In actual practice, however, all department heads are alike responsible to the chief executive; and all submit reports and recommendations which quickly become common property at the two ends of Pennsylvania Avenue. Both president and Congress, furthermore, may at any time make requests of department heads for information, with or without accompanying advice. The president usually asks informally and orally for such data as he desires, although of course he may resort to written communications. Congress, or either house, normally makes its requests through the medium of resolutions. Armed with the power of removal, the president is able to enforce compliance. But Congress is in a different position; if a department head refuses to respond to a request, and is upheld in doing so by the president, it is helpless, unless it is willing to resort to the extreme expedient of impeachment. The Supreme Court has held, furthermore, that when the head of a department is

5. Supplying information and giving advice

¹ *American School of Magnetic Healing v. McAnnulty*, 187 U. S. 94 (1902).

² F. F. Blachly and M. E. Oatman, *Administrative Legislation and Adjudication*, Chaps. iv-xii; and for fuller treatment, J. P. Chamberlain, N. T. Dowling, and P. R. Hays, *The Judicial Function in Federal Administrative Agencies* (New York, 1942).

required to give information, he may do so through subordinates, rather than in person.¹

6. Serving on boards and committees

Finally, all heads of departments, but especially those of such departments as the Treasury, Interior, Agriculture, and Labor, are called upon to serve *ex officio* as members of various supervising or coordinating boards and committees. In some cases, duties are only nominal, but in others there is important work to be done.

The Growth of Independent Establishments

Stages

At the close of the first hundred years under the constitution, there were still only seven executive departments, concerned almost entirely with the older, primary functions of government such as foreign relations, finance, justice, and defense. Not long thereafter, however, three additional departments, having to do with agriculture, commerce, and labor, made their appearance, and along with them the earliest important agencies (notably the Civil Service Commission in 1883 and the Interstate Commerce Commission in 1887) set up outside of the departments, and on that account known as "independent establishments." Later on, proposals for still more departments were plentiful. None was adopted; but that did not prevent administrative and regulatory agencies from continuing to multiply. On the contrary, they sprang up like mushrooms—some (like the Federal Trade Commission in 1914 and the U. S. Tariff Commission in 1916) as products of the vigorous regulatory policies of the first Wilson Administration, others in years of readjustment (especially 1920-21) following World War I, and ever so many more in the era of the New Deal, when, in furtherance of the steadily broadening recovery and reform program of the Roosevelt Administration, Washington became a veritable labyrinth of new "alphabetical" establishments, a few of them attached more or less loosely to a department, but the majority having no connection of the kind. In a constantly changing scene, some agencies, of course, disappeared because of time limits, some on account of shifts of policy, some (as in the case of the National Recovery Administration—the famous "N.R.A.") because of judicial decisions overthrowing the legislation on which they rested, still others by consolidations or other forms of reorganization. But many dropped out only to be replaced by more or less similar substitutes; entirely new ones—like the Social Security Board in 1935—kept thrusting themselves into the picture; and, altogether, an official committee which surveyed the situation in 1936² was able to find—entirely apart from the bewildering array of agencies in several of the larger departments—not fewer than

¹ *Miller v. Mayor of New York*, 109 U. S. 394 (1883). One department head is charged in a particular degree with giving advice, namely, the attorney-general, from whom the president habitually solicits opinions upon the constitutionality or legal propriety of contemplated executive actions or of legislation about which there might be doubt.

² The President's Committee on Administrative Management. See p. 412 below.

ninety different federal establishments.¹ One would not need to be told, too, that after 1940 the defense effort and the later war gave rise to numerous new establishments of the kind (largely as constituent units of the Office for Emergency Management in the Executive Office of the President), although for the most part destined to be only temporary.²

How is this remarkable development (duplicated, too, in the states) Reasons to be accounted for? Why so great multiplication of activities? And why, in so many cases, activities assigned to independent establishments rather than to the regular departments? One can understand that in wartime or in depression emergency, government must embark upon many novel and more or less temporary activities; also that the shortest cut to carrying them out effectively may easily seem to be to assign them to agencies especially created for the purpose. But how account for the great establishments like the Interstate Commerce Commission, the Federal Trade Commission, and many more that have been set up in normal times with a view to permanence and endowed, as the years have passed, with ever-growing powers? The answer is to be found in (1) the overflowing of state boundaries by trade and business, and by programs of social amelioration, requiring that state regulation be supplemented by national control, and (2) the inability of Congress—on account of the technical character, the ceaseless fluctuations, and the widening scope of the problems involved—to supply the needed regulation on other than very broad and general lines. But why assign the resulting functions to an independent establishment rather than to a department? There is no single reason. Sometimes the decision was made for no good reason at all—because of personal or political considerations, or even sheer carelessness. Sometimes Congress (or the president acting under the authority of Congress) was reluctant to impose upon a department still more heterogeneous tasks than it already had. Often it was considered that the work to be provided for would be performed more satisfactorily (a) by officials appointed directly by the president and Senate, for relatively long terms, than by subordinates in a department, and (b) by a non-partisan (or more truly bi-partisan) board bringing several minds to bear upon the problems of policy-making involved, than by officials acting singly. Occasionally, decision was dictated by the convenience of carrying on some important enterprise of the government through the instrumentality of a corporation, chartered under the laws of one of the states or of the District of Columbia, with capital stock held partly or entirely by the government, and managed by officers and a board of directors or trustees

¹ For a tabulation as of 1933 (at the beginning of the New Deal), see L. F. Schmeckebier, "Organization of the Executive Branch of the National Government of the United States," *Amer. Polit. Sci. Rev.*, XXVIII, 952-956 (Dec., 1933). All changes from that date to 1942 are recorded in supplementary lists compiled by Mr. Schmeckebier and published from time to time in later issues of the same journal. Current lists nowadays will be found in the *U. S. Government Manual*, issued three times a year.

² See pp. 687-688 below.

on lines prevailing in an ordinary private business.¹ Often influential, too, was a desire to assign functions to agencies less directly under the control of the president, and more responsible to Congress, than are bureaus or divisions within a department.²

Kinds of
power
exercised

Viewing the independent establishments as a group, some are discovered to be merely fact-finding agencies, with no power to do anything except carry on inquiries and make reports. Of such nature is the Tariff Commission, charged with studying the administration, operation, and effects of the tariff laws and reporting its findings to the president and Congress. A few are found to be primarily investigative, but with authority also to use their influence, in more or less direct ways, to promote definite ends, conditions, or interests. Increasing numbers, however, are charged with administrative duties; many, too, with making regulations to apply and supplement the broadly phrased acts of Congress, on lines which, even though the courts may shrink from admitting it, are clearly legislative; many, in addition, wield weighty judicial—or again to speak by the book, *quasi-judicial*—powers. In certain instances, legislative and judicial work quite transcends administration in any exact sense of the term, bringing the establishments closer functionally to Congress or the courts than to the president. Indeed, nearly all of the greater commissions, *e.g.*, the Interstate Commerce Commission, the Federal Trade Commission, the Federal Communications Commission, and the Federal Securities and Exchange Commission, defy the principle of separation of powers by being at one and the same time administrative, legislative, and judicial, and indeed also investigative and advisory. It goes without saying that service with agencies of this nature presupposes both ability and experience; and it is gratifying to observe that while practically all commissioners are on a political basis in the sense of being appointed by the president and Senate, a large proportion of them bring to their tasks both of the qualifications mentioned, often including experience in other, and sometimes similar, federal or state positions.³

The Developing Need for Administrative Reorganization

Criticism
of con-
ditions
and
trends

It is not surprising that a huge administrative mechanism built up without plan or design, "like the barns, shacks, silos, tool sheds, and garages of an old farm," should show serious defects; and criticism

¹ Examples include the Reconstruction Finance Corporation, the Federal Public Housing Authority, the Federal Deposit Insurance Corporation, and the Tennessee Valley Authority. For a brief discussion of government corporations of the kind, see M. Fainsod and L. Gordon, *Government and the American Economy* (New York, 1941), Chap. xix.

The best treatise on the general subject of independent establishments is R. E. Cushman, *The Independent Regulatory Commissions* (New York, 1941).

² In pursuance of this objective, members were usually given longer terms than the president, and also overlapping terms, so that no chief executive would likely be able to control the membership completely. We have seen, too, that the president's power of removal is limited. See pp. 360-361 above.

³ This aspect is treated fully in P. Herring, *Federal Commissioners; A Study of Their Careers and Qualifications* (Cambridge, Mass., 1936).

was long profuse, not only from taxpayers and politicians, but from competent students of public administration as a science and an art. Administration is the costliest part of government, and the taxpayer was stirred, from far back in the present century, by the multiplicity of newer agencies to be supported, each naturally bent upon consolidating its position, expanding its activities, and lengthening its payrolls, and each tending to become a parent stem from which still newer agencies and services germinated. On more general grounds, people of varying interests and connections complained of the insidious growth and direful possibilities of "government by commission," in the national sphere as well as in the states.¹

Much of the criticism was inspired, of course, by dislike of the extension of government control over business and other aspects of economic life—tantamount, we were told, to paternalism, and bordering dangerously upon socialism—and especially from hostility to the expansion of national regulation at the expense of the states. In other words, what many critics had in mind primarily was the functions performed rather than the machinery employed. Yet those who fixed their attention upon the latter also found plenty of grounds for complaint.

First and most obvious was the lack of coherence and integration inevitably flowing from the circumstances under which the administrative system had been built up. Many offices and bureaus, to be sure, upon being created to meet some definite administrative need, were fitted into the scheme in a manner entirely appropriate. But in perhaps equally numerous instances a new unit or service was simply tacked on at any point that at the moment seemed convenient, or that political or other extraneous considerations dictated. In many cases, no new unit or service ought to have been created at all; an existing one ought merely to have been enlarged or otherwise reconstructed. As a consequence, not only did independent establishments spring up on all sides, but some of the executive departments (notably the Treasury) became veritable jungles of unrelated units and services. Administrative and regulatory work in great fields like public health and conservation of natural resources was parcelled out among half a dozen different agencies, scattered through three or four departments or in no department at all—a situation from which could result only confusion, duplication, and waste, accentuated by jealousies and disputes among department heads and bureau chiefs as to who should control particular activities.²

Some specific faults as found by experts:

1. General looseness and planlessness

¹ Books voicing such criticisms in a somewhat lurid and extreme fashion include J. Beck, *Our Wonderland of Bureaucracy* (New York, 1932); L. Sullivan, *The Dead Hand of Bureaucracy* (Indianapolis, 1940), and *Bureaucracy Runs Amuck* (Indianapolis, 1944).

² A survey made by Herbert Hoover as secretary of commerce in 1925 revealed that at that time four different bureaus, in two departments, had to do with public health; eight agencies, in five departments, were charged with the conservation of resources; fourteen agencies, in nine departments, were engaged in public works construction and engineering; another group of fourteen, in six departments, administered merchant marine laws; and the purchasing of some two hundred million

2. A
"headless
fourth
branch
of the
govern-
ment"

A second main defect, closely connected with the foregoing, was the lack of effective responsibility to, and of control by, the chief executive. The fault was not the president's; agencies were so numerous and their relationships so confused that no man could possibly keep an eye on them all. As a result, however—President Roosevelt's Committee on Administrative Management¹ asserted—there had grown up, without plan or intent, "a headless fourth branch of the government, responsible to no one, and impossible of coördination with the general policies and work of the government as determined by the people through their duly elected representatives." Good administration presumes direct and simple lines of authority and responsibility. The lines running between many of the federal agencies and the president were, however, both devious and obscure. Indeed, many boards and commissions were so far removed from presidential control that their performance of administrative functions constituted a positive invasion of the president's rights and responsibilities as over-all manager of national administration—a situation further aggravated by restrictions upon the power of removal as asserted by the Supreme Court in the Humphrey case of 1935.²

3. Mis-
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istration

A great deal of discussion, indeed, centered upon the proper functioning of these same boards and commissions. For certain types of work, such bodies have obvious advantages. Their members are presumably selected in accordance with the nature of the tasks to be performed, and also with a view to representing different political parties and varied social and economic interests. They enjoy relatively long terms—overlapping, too, so that there is never a complete change of personnel at one time—and they commonly acquire a high degree of expertness. A commission ordinarily has time and facilities for investigation and deliberation, as well as for decision and action. In making rules and deciding appeals, it has the advantage of sufficient numbers to yield a balanced judgment. Its procedure, compared with that of legislatures and courts, is flexible and informal. It can, and often does, maintain helpful and significant relations with corresponding agencies in the states. As must be apparent, however, a commission is adapted mainly to consultation, discussion, policy-framing, rule-making, and perhaps quasi-judicial action. A difficulty is that, in many instances, boards and commissions have been endowed with important administrative functions which they are too slow and cumbersome to perform acceptably; and in pronouncing them proved "failures" as administrators, the President's Committee on Administrative Management recommended that they be no longer em-

dollars' worth of supplies was carried on through no fewer than forty agencies in Washington and thirty-four in other parts of the country. On a later occasion, Mr. Hoover commented upon having found that the brown bears were under the jurisdiction of the Department of Agriculture, the grizzly bears under the care of the secretary of the treasury, and the polar bears under his own protection as secretary of commerce!

¹ See p. 412 below.

² See pp. 360-361 above.

ployed in this capacity—even though, if all were placed in one or another of the departments, as the Commission advised, at least the difficulty, alluded to above, with respect to presidential control would presumably be removed. For consultation, discussion, advice, and as representatives of diverse views and citizen opinion, plural agencies, the Commission conceded, are “extremely useful and necessary.”

Reorganization Partially Achieved

Until some thirty years ago, efforts to improve the federal administration were confined largely to extending the merit system in the civil service and to introducing better business methods, as, for example, in purchasing supplies. Advances in these directions were greatly needed, and considerable benefits resulted. Then, however, began to loom the steadily growing problem of reconstructing and integrating the entire administrative and regulatory set-up; and in later years this matter received a good deal of attention—from presidents, congressional committees, students of administration, and civic bodies. Almost every one was prepared to render at least lip-service to reorganization in principle. But invariably, when a concrete plan was brought forward, opposition from various quarters paralyzed action. By general admission, any worthwhile reorganization would have to be planned by the executive branch itself and put into effect by presidential order. Authority to proceed, however, could come only from Congress; and until within the past few years that body, doubtful about many of the issues involved and hesitant to intrust the necessary discretion to the president, usually shied away from the subject. As would be surmised, commissioners, bureau chiefs, and other officials and agencies, unwilling to be “abolished,” or even transferred, were commonly predisposed against the launching of any general reorganization program. The pros and cons of various suggested changes, too, were generally rather technical, and people at large, although certainly standing to profit from increased efficiency and economy, were neither much acquainted with the problem nor interested in it. Even among the well-informed, there was honest doubt as to whether some of the changes advocated—especially those looking to the gathering of scattered agencies into existing or new executive departments—would not lead to undesirable extensions of national control, with corresponding weakening of the states. Fear was expressed, too, lest reorganization be found to have had the effect of throwing certain services or agencies into politics.

Presidents Taft, Wilson, and Harding gave their support to reorganization proposals that eventually came to nothing; and although, under terms of an act signed by President Hoover a few hours before he went out of office, President Franklin D. Roosevelt was able, by executive orders in 1933-34, to introduce a number of significant changes, much remained to be done when he, in 1936, appointed the Committee on Ad-

Obstacles

Reorgan-
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Act of
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ministrative Management to make a full survey of the situation. Reaching Congress at a time, in 1937, when feeling ran high over the President's project for reorganizing the Supreme Court,¹ bills aimed at carrying out recommendations made in the Committee's terse and illuminating report encountered rough sailing.² At length, however, in the spring of 1939, a Reorganization Act of major importance (even though differing sharply from an earlier measure unsuccessfully sponsored by the Administration) was placed on the statute-book.³ No change was made in the number or names of the executive departments; fifteen leading independent establishments were wholly exempted from the terms of the measure; and provision for extension of the merit system in the civil service was entirely omitted.⁴ Within the wide limits that remained, however, the President was authorized, until January 20, 1941, to "reduce, coördinate, consolidate, and reorganize" the various agencies of the government, employing for the purpose, not executive orders, but rather proposed "plans,"⁵ which should become effective sixty days after being transmitted to Congress unless in the meantime disapproved in their entirety by concurrent resolution of the two houses. The objects of all changes made were to be (1) to reduce expenditures, (2) to increase efficiency, (3) to group agencies "according to major purpose," (4) to reduce the number of agencies, and (5) to "eliminate overlapping and duplication of effort."

Resulting
changes

Nothing less than a chapter or two would suffice for even an outline of the numerous changes in administrative organization that now took

¹ See pp. 472-477 below.

² The report proper was published under the title of *Administrative Management in the Government of the United States* (Washington, 1937); the report, together with various supporting studies, under the title of *Report of the Committee [on Administrative Management], with Studies of Administrative Management in the Federal Government* (Washington, 1937). Supporting studies made by experts under the Committee's direction were published separately under appropriate titles.

Bracketing "good administration" with "consent of the governed" as a prime requisite of good government, the report recommended (1) that substantially all independent establishments, including the great commissions, be placed by presidential order in some one of the executive departments; (2) that after being placed in a department a commission be divided into an administrative section and a judicial section, the one to form a regular bureau or division in the department, the other to be in the department only for purposes of "administrative housekeeping" but otherwise wholly independent both of the department and of Congress; (3) that the Department of the Interior be renamed Department of Conservation and two new departments—Social Welfare and Public Works—be created; (4) that a National Resources Board be set up to serve as a permanent central planning agency under the president; (5) that the merit system be extended "upward, outward, and downward" to include all positions in the executive branch of the government except those of a policy-determining nature; and (6) that administrative reorganization be thenceforth viewed, not as something to be accomplished once for all and at a stroke, but as a continuous activity aimed at meeting changing needs and conditions.

³ 53 U. S. Stat. at Large, 56.

⁴ Various independent actions of 1938-40 (both legislative and executive) nevertheless vastly extended the merit system. See p. 426 below.

⁵ The device of the "plan," rather than of executive order, was specified on the theory that the president would act in the matter in his legislative, rather than his executive, capacity, and also because there was doubt whether Congress can constitutionally nullify an executive act of the president by a mere concurrent resolution. See J. D. Millett and L. Rogers, "The Legislative Veto and the Reorganization Act of 1939," *Pub. Admin. Rev.*, I, 176-189 (Winter, 1941).

place. Indicating that he would lay before Congress the items in his reorganization program in several batches, or instalments, the President submitted Reorganization Plan No. 1 on April 25, 1939, and thereafter four additional "Plans" (all worked out by the Bureau of the Budget) at intervals during 1939-40. As was to be expected, every new series of proposals (even though the later ones were not very extensive) evoked opposition in Congress, among the agencies affected, and in some instances on the part of the press and public. Not one, however, was blocked.

With no attempt at full enumeration or description, a few major *types* of changes now made may be indicated as follows: (1) large numbers of establishments previously independent, *e.g.*, the Rural Electrification Administration and the Inland Waterways Corporation, were placed in one or another of the ten departments; (2) long lists of others, while not placed in the departments, were grouped in three coördinating "agencies"—a Federal Security Agency, a Federal Loan Agency,¹ and a Federal Works Agency—each under an "administrator," and constituting a new level in the general administrative set-up;² (3) a series of units, both old (*e.g.*, the Bureau of the Budget) and new (*e.g.*, the National Resources Planning Board) were brought together in a newly created Executive Office of the President;³ (4) several establishments (*e.g.*, the Bureau of Insular Affairs in the War Department and the National Bituminous Coal Commission) were abolished outright and their functions transferred elsewhere; and (5) with a view to better departmental integration, various units and services were shifted from one department to another (*e.g.*, the Biological Survey from Agriculture, and the Fisheries Bureau from Commerce, to Interior; the Foreign Commerce Service from

¹ Superseded, under an executive order of February 24, 1942, by a National Housing Agency, as indicated below. Loan Agency units not concerned with housing were transferred to the Department of Commerce.

² This organization is now (1945), mentioning more important agencies only, as follows:

1. *Federal Security Agency:*
Office of the Administrator (including Office of Community War Services)
Office of Education (tr. from Interior)
Public Health Service (tr. from Treasury)
Social Security Board
Office of Vocational Rehabilitation
Food and Drug Administration
2. *National Housing Agency:*
Office of the Administrator (including Homes Use Service)
Federal Home Loan Bank Administration
Federal Housing Administration
Federal Public Housing Authority
3. *Federal Works Agency:*
Public Roads Administration (tr. from Agriculture and renamed)
Public Buildings Administration (assembled from various depts.)
Public Works Administration (in process of liquidation)
Federal Fire Council
War Public Works and Services Programs.

³ The National Resources Planning Board has since been discontinued. See pp. 597-598 below.

Commerce to State; the Weather Bureau from Agriculture to Commerce; and the Bureau of Immigration and Naturalization from Labor to Justice). In many instances, of course, units appearing under new names in one or another of the departments or "agencies" represented, wholly or in part, an integration of units previously scattered, whether in departments or otherwise.

A continuing
problem

A main objective at all stages was reduction of costs; adoption of his first Plan alone, the President assured Congress, would save the taxpayers fifteen or twenty million dollars a year. Hardly had the new arrangements begun to operate, however, before gigantic preparations for national defense created a wholly abnormal situation, and soon the nation was plunged into global war. With the picture thus blurred, it is impossible to tell how much actual saving has been effected. More important, and more emphasized, however, were the gains anticipated in administrative efficiency; and while here again wartime complications frustrated any full and fair test, it is the considered opinion of competent observers that the administrative system better withstood the shock of war and functioned more effectively because of the improvements that had been introduced. In a governmental system as vast and complicated as that of the United States, no given pattern of administrative organization can ever be regarded as completely satisfactory, or as in every respect the best conceivable. And even if such perfection could be attained, it would not endure; for, administration being essentially a matter of processes and procedures, changing conditions, situations, and needs call continuously for readjustments, in detail and even in the large, in the machinery and techniques by which it meets the day-to-day demands upon it. That is why the President's Committee on Administrative Management urged a conception of administrative reorganization as being, not a task to be performed at a stroke and thereupon considered finished, but rather as an activity requiring continuous attention and effort directed to meeting new situations as they emerge.

How deeply this wholesome view of the matter has impressed itself upon the legislative and executive branches of the government can be known only after the country returns to the ways of peace. For since 1940 the normal federal administrative set-up has been overlaid with a labyrinth of emergency agencies having to do, in one way or another, with the defense effort of 1940-41 and with the conduct of the war. The First War Powers Act, approved less than two weeks after Pearl Harbor, indeed, authorized the president independently to make redistributions of functions among executive agencies, so long as limited to "matters relating to the conduct of the present war, and to be in force during the continuance of the war, and for six months thereafter."¹ The power

¹ This particular grant in the War Powers Act was made in lieu of a renewal and broadening of the Reorganization Act of 1939 which the President had vainly requested of Congress.

thus conferred has been exercised with the utmost freedom, and no end of changes—creations, transfers, consolidations, and what not—have resulted. How many will last a month, a year, a decade, no one can say. Meanwhile, of the general longer-term situation one can perhaps observe only (1) that a reorganization extending beyond any that looked possible a decade or more ago—although leaving much still to be done—was carried out under the act of 1939, and (2) that the experience set a pattern for peacetime reorganization procedures which should prove useful in postwar days when the administrative arrangements with which we entered the war—showing, as they will, many effects of wartime pressures—will no doubt call for much fresh readjustment.¹

The Problem of the Regulatory Commissions

From the president's authority to plan and carry out reorganizations, the legislation of 1939 expressly exempted fifteen independent establishments, including most of the great regulatory commissions. It was not that the commissions as then operating were regarded as in no need of attention; on the contrary, they (at least some of them) were objects of severe criticism. They, however, were of a different order from the more purely administrative agencies with which, in the main, the president was empowered to deal; and for this reason, if no other, Congress preferred that any action relating to them be taken by direct legislation.

The complaints directed at the commissions had to do principally, not with organization or function, but with various procedures which, in the almost total absence of regulation in the statutes, the commissions had built up for themselves, sometimes over a long period of years. Rules and regulations vitally affecting the rights of persons and property were often made without the people concerned being allowed opportunity to be heard; findings and decisions of a judicial nature were reached and enforced without a chance for injured persons to appeal to the courts; in several instances, commissions had very literally become "*independent establishments*"—self-contained and operating almost as if in an airtight compartment. The fault was not wholly that of the commissioners; without much direction from Congress, they had simply built up procedures required or justified, as it seemed to them, by the nature of the tasks assigned them. Outsiders considered, however, that in a good many cases they had pushed their authority too far; and in 1939, growing dissatisfaction, especially in the legal profession and among certain elements in Congress, came to a head in a drastic regulatory measure drafted by the American Bar Association's special committee on administrative

Reasons
for dis-
satisfac-
tion

¹ Apart from publications emanating from the President's Committee on Administrative Management, the principal study of the subject in relation to developments since 1932 is L. Meriam and L. F. Schmeckebier, *Reorganization of the National Government; What Does It Involve?* (Washington, 1939).

Various aspects of national administration in wartime are dealt with in Chaps. xxii and xxv below.

The
Logan-
Walter
Bill
(1939)

law, and known, from the names of its immediate sponsors, as the Logan-Walter Bill. To be sure, several of the old-line commissions—among them the Interstate Commerce Commission and the Federal Trade Commission—were exempted from the measure's provisions, the object clearly being to strike rather at certain New Deal establishments (particularly the National Labor Relations Board and the Federal Securities and Exchange Commission) whose procedures were especially disliked.

The At-
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General's
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President Roosevelt had in the meantime recognized that a problem did exist, and had set up an able committee of lawyers, known as the Attorney-General's Committee on Administrative Procedure, to undertake an extended and dispassionate study of it; and when Congress proceeded to pass the Logan-Walter measure (in the Senate, without a dissenting vote), he carried out his known intention by striking it down with a sharply worded veto. From the Attorney-General's Committee came, in 1941, an extensive report, accompanied by a drafted bill for carrying out the recommendations made—a report freely conceding the need for restrictions upon the quasi-legislative and quasi-judicial procedures of commissions in general, but a bill conceived in better spirit, and considerably milder in its provisions than its partisan and vindictive Logan-Walter rival.¹ Partly because a Congress, rebuffed by veto of its own measure, was not in a mood to turn to an alternative sponsored by the Administration, but also because the outbreak of war almost at once turned the attention of every one in a different direction, no legislation resulted. Meanwhile the centering of thought of scholars, congressmen, judges, and administrators themselves upon the problem over a period of years has resulted in improvements carried out under no statutory compulsion; although, on the other hand, wartime necessities have accustomed the country, for the time being at least, to procedures in

¹ One of the major points of difference lay in the wide opportunity provided by the Logan-Walter Bill for appeal to the courts by persons dissatisfied with commission actions—a feature which, it was contended by the bill's opponents (including President Roosevelt), would precipitate the commissions into a bog of court proceedings, clog the courts with petty litigation, and at the same time tend to promote judicial autocracy. An acute analysis of the Logan-Walter Bill will be found in J. M. Landis, "Crucial Issues in Administrative Law," *Harvard Law Rev.*, LIII, 1077-1102 (May, 1940).

On the alternative plan, see *Final Report of the Attorney-General's Committee on Administrative Procedure* (Washington, Govt. Printing Office, 1941), preceded by the publication of twenty-seven mimeographed monographs and by an interim report under date of January 31, 1940. The chairman of the committee was Dean G. Acheson, more recently an assistant secretary of state. For a summary of the report, see J. Hart, "Final Report of the Attorney-General's Committee on Administrative Procedure," *Amer. Polit. Sci. Rev.*, XXXV, 501-506 (June, 1941), and for a fuller analysis, L. L. Jaffe, "The Report of the Attorney-General's Committee on Administrative Procedure," *Univ. of Chicago Law Rev.*, VIII, 401-440 (Apr., 1941). Three of the twelve members, while concurring in the major features of the report, considered its legislative proposals inadequate and hence submitted a minority report, accompanied by a minority bill. Cf. L. L. Jaffe, "The Reform of Federal Administrative Procedure," *Pub. Admin. Rev.*, II, 141-158 (Spring, 1942); F. F. Blachly and M. E. Oatman, "A New Approach to the Reform of Regulatory Procedure," *Georgetown Law Jour.*, XXXII, 325-374 (May, 1944); R. F. Fuchs, "The Federal Civil Service for Lawyers," *Pub. Personnel Rev.*, V, 163-176 (July, 1944).

many cases more summary and arbitrary than those formerly stirring complaint.

After the war, a fresh view of the entire matter will have to be taken; and it will be interesting to see to what extent the earlier insistence of reformers upon a maximum of protection for the individual as against commission rules and decisions will reassert itself. The probability being that it will do so in such degree as to force legislative action on some such lines as those contemplated in the proposals of the Attorney-General's Committee (in so far as reforms shall not already have been brought about voluntarily), our comment on the subject may appropriately close with a summary of the principal changes therein advocated, as follows: (1) greatly increased publicity for all existing and newly made rules and regulations, with new regulations normally taking effect only forty-five days after publication in the *Federal Register*, and with interested persons guaranteed opportunity in the meantime to submit views and comments; (2) commissions to be empowered to obviate unnecessary uncertainties by issuing "declaratory," or advance, rulings; (3) separation of judicial and prosecutive functions within the establishments by provision that persons investigating and presenting cases shall have no part in deciding them; (4) a new corps of relatively independent officers within each establishment, to be known as "hearing commissioners," and charged with hearing and deciding litigated disputes between the agencies and private persons, leaving the agency heads, so far as their quasi-judicial functions go, to act wholly as appellate authorities;¹ and (5) creation of a new Office of Federal Administrative Procedure, under a director, to review the practices of regulatory agencies, to carry on continuous study of the work of such bodies, to receive complaints from the public, and from time to time to recommend improvements.

Its proposals

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CHAPTER XXII

THE EXECUTIVE CIVIL SERVICE

President, heads of departments, under-secretaries and assistant secretaries, division heads and bureau chiefs—these and other managerial officers at Washington form numerically only an insignificant fraction of the multitude of men and women who, year in and year out, carry on the civilian activities of the national government. Nine-tenths, or more, of the whole number constitute the far-flung force known as the executive civil service—"executive," as being attached to the executive rather than the legislative or judicial branch of the government, and "civil," as differentiated from the Army, the Navy, the Marine Corps, the Coast Guard, and other establishments of a military character. Under our federal system, all of the states, together with their subdivisions, have civil services of their own; and in the aggregate the personnel on these levels, in normal times, heavily outnumbers that on the federal level.¹ Starting with only some three hundred in 1789, the federal service, however, mounted to 208,000 by the close of the nineteenth century, rose to above 900,000 under impact of the first World War, ran along between 500,000 and 600,000 during the ensuing decade and a half, passed the million mark for the first time during the defense effort of 1940-41, stood at 1,545,131 when Pearl Harbor plunged the country into war, reached an all-time peak at 3,156,953 on July 1, 1943,² and after tapering off slightly in 1943-44 under the impact of a determined drive in Congress for the elimination of unessential personnel, stood at the still huge figure of 2,888,900 in January, 1945. New war agencies, combined with expansion of the activities of existing agencies, invariably result in a greatly increased civil service in wartime. But nothing like the mushrooming of the federal service in 1941-43 was ever before experienced, or envisaged, in this country.

Contrary to popular impression, the federal civil service, even in peacetime, is not made up simply of "government clerks" engaged in dull routine. Instead, it contains a vast array of scientists, *e.g.*, chemists, biologists, agriculturists, medical officials, engineers (civil, electrical, hydraulic, mining, sanitary, road, etc.), foresters, geologists, agronomists, live-stock experts, entomologists, hydrographers; an impressive corps of economists, statisticians, and accountants; numerous lawyers; a great

¹ Thus in prewar years when the federal service numbered less than one million, state and local services together numbered from three to three and one-half millions.

² Exclusive of 250,145 persons serving temporarily at one dollar a year or without compensation.

body of experienced and responsible administrators.¹ Only a small proportion live and work in the national capital—on June 30, 1940 (to take a date when fairly normal conditions still existed), 133,645 as compared with the 869,175 then constituting the field service, the latter performing duties in all parts of the land, including the dependencies, and, in the case of the diplomatic and consular establishments, in foreign countries as well.² For many years before the war, the proportion of women in the service remained fairly constant at around nineteen per cent. Under wartime conditions, however, it rose, in 1945, to thirty-seven per cent—the number of women employed (somewhat over one million) exceeding the total of federal employees, men and women, during World War I.³

Earlier Personnel Problems—Spoils versus Merit

Even though, by its nature, composed of subordinates, the civil service, on the national as on other levels, is therefore not a mere piece of power-driven machinery—a simple collection of robots. Rather, it is a multitude of men and women, an aggregate—under swollen wartime conditions of nearly three million human personalities; and while the efficiency with which it discharges its functions depends to a degree upon the wisdom of the laws given it to administer, the intelligence of the supervision over it exercised from above, and the adequacy of financial provisions made for it, the matter of greatest importance is the fitness of the civil servants themselves for the jobs assigned them. For our purposes, discussion of the federal civil service therefore resolves itself largely into a survey of different aspects of civil service personnel. How are civil servants recruited? Are they selected and appointed for reasons of demonstrated merit, or on merely personal and political grounds? How are they classified and paid? How is their work evaluated, and under what conditions are they promoted? How are removals made, and why?

¹ As far back as 1928, a Personnel Classification Board needed 1,300 pages of print to describe the more than two thousand types of positions then existing in the field service alone. Twenty-three different kinds of engineers were enumerated. In discussions of the subject, the terms "officer" and "employee" are often used interchangeably. There is, however, a distinction—an officer being properly a person *appointed* to a public position *created by law*, an employee a person merely *hired* to do certain work. The difference is that between, for example, a collector of internal revenue and a stenographer in his office. For the federal Supreme Court's interpretation of the matter, see *Burnap v. United States*, 252 U. S. 512 (1920).

² Even under wartime conditions (in January, 1945), the number in Washington was only 256,043, or a little over nine per cent of the total.

³ Until 1932, the Civil Service Commission kept men and women eligibles on separate lists, and certified to appointing officers from one list or the other as requested. In the year indicated, however, an amended rule authorized the Commission to merge the existing registers, and thenceforth to certify eligibles without regard to sex unless the nature of the duties is such that, in the Commission's opinion, they can be performed only by men or by women, as the case may be. In normal times, the preference given men who have been in military service operates to keep the proportion of women lower than it otherwise would be (see p. 435 below). Since 1933, one of the three members of the Civil Service Commission has been a woman, Lucile F. McMillin, who has written *Women in Federal Service* (3rd ed., Washington, 1941).

What arrangements are there for retirement? What opportunities have civil servants for bettering their condition? To what extent does the service offer opportunity for a career?

For a generation or more after the national government was organized under the constitution, the selection and appointment of administrative officers and employees left little to be desired. Washington placed the matter at the outset upon a high plane by announcing his intention to "nominate such persons alone to offices . . . as shall be the best qualified"; and although the rise of political parties led his successors to give more weight to political considerations when filling posts as they fell vacant or as new ones were created, there were not many removals for partisan reasons—except during the first two years of Jefferson's first administration.

Character of appointments, 1789-1829

Then came the election of Andrew Jackson, and with it a new theory and practice as to personnel in the national government. Already, a Tenure of Office Act of 1820 had helped set the stage for a spoils system by fixing a four-year term for district attorneys, collectors of customs, and other groups of officials, thereby giving every incoming president a large number of positions to fill without the inconvenience of discovering reasons for removing competent incumbents.¹ Out of Tennessee came Jackson with the conviction, first, that the duties of all public offices were (or could be brought) within the capacity of any man of intelligence, and, second, that "more is lost by the long continuance of men in office than is generally to be gained by their experience." Putting his view into practice, the new chief executive did not indeed make the clean sweep of anti-Jacksonian office-holders for which many of his supporters clamored, but nevertheless filled substantially all posts falling vacant with men who thought as he did, and in addition removed, in his first year alone, officers and employees of all grades to the then unprecedented number of some seven hundred.

Jackson and the spoils system

The blame for fastening the spoils system upon the country is, however, not to be laid entirely, or even mainly, at Jackson's door. In the first place, partisan removals and appointments were already familiar in many states² and cities, the practice now being merely carried over in a large way into the domain of the national government. In the second place, the tightening up of party machinery, and the intensification of party politics, following the so-called "era of good-feeling," would have led in any case, under conditions then existing, to an increased use of public offices as rewards for party service. Finally, Jackson's views on office-holding, while abhorred by many people, were warmly endorsed by

¹ Until this measure was passed, it was customary for federal officials, except of course the president, vice-president, and heads of executive departments, to hold office during good behavior. Additional groups were brought under the terms of the act in later years, e.g., postmasters in 1836.

² Notably New York and Pennsylvania. See H. L. McBain, "DeWitt Clinton and the Origins of the Spoils System," *Columbia Univ. Studies in Hist., Econ., and Pub. Law*, XXVIII (New York, 1907).

those forces of the new democracy, especially in the West and South, that had been mainly responsible for his election. When, in 1832, Senator William L. Marcy of New York summed up the arguments of Jacksonians in the remark, "To the victors belong the spoils," he coined a phrase that struck home; removals, as well as appointments, for party reasons became part of the accepted order of things.

Begin-
nings of
reform

People, however, could not wholly close their eyes to the system's unfortunate consequences. On all sides, experienced and worthy public officials were ousted to make room for political henchmen. The public services were thrown into demoralization every time a change of administration took place. The president was harassed almost beyond endurance by place-seekers and their friends. Congressmen tended to become mere solicitors and dispensers of patronage. Administration fell to a generally low level; politics itself grew more mercenary and corrupt. As early as 1853 and 1855, Congress undertook, in a feeble way, to improve conditions by requiring that some thousands of clerkships in Washington be classified on a basis of compensation, and that candidates be appointed to these positions only after examination by the head of the appropriate department. Even on this limited scale, the reform came to nothing; and an act of 1871, under which a civil service commission was set up and a limited scheme of competitive examinations introduced, proved almost equally barren of results.

The Pen-
dleton
Act
(1883)

Happily, the cause—although subjected to merciless opposition and ridicule—was not lost. Able men turned their best energies to its support; national and state civil service reform associations were organized;¹ recent reforms in Great Britain were investigated and made familiar to American readers.² *Harper's Weekly*, *The Nation*, and other influential journals took up the fight; political parties found it advisable to put planks on the subject in their platforms; the assassination of President Garfield by a disappointed office-seeker in 1881 supplied dramatic impetus, and the new president, Arthur, confounded the prophets by vigorously espousing the cause. The upshot was that, early in 1883, Congress passed a well-considered civil service act³—modeled on the English order in council of 1870, and commonly known as the Pendleton

¹ Notably the National Civil Service Reform League (renamed, in 1945, National Civil Service League), founded in 1881 and today one of the most vigilant and influential agencies for promoting the application of merit principles in the national civil service. On the League and its work, see F. M. Stewart, *The National Civil Service Reform League* (Austin, Tex., 1929). *Good Government*, published bimonthly at 67 W. 44th St., New York City, is the League's official organ.

² Especially through a scholarly book entitled *The Civil Service in Great Britain* (New York, 1880), written by an ardent reformer, Dorman B. Eaton, whom President Hayes commissioned to study the British system with particular reference to its adaptation to conditions in the United States. After ineffectual earlier efforts, Great Britain adopted, by order in council of 1870, a comprehensive merit plan which forms the basis of what is today the most carefully selected, and perhaps the most efficient, civil service in the world. See F. A. Ogg, *English Government and Politics* (2nd ed.), Chap. x.

³ 22 U. S. Stat. at Large, 403.

Act—which from that day to this has been the basic law governing admission to the national civil service.¹

Progress of the Merit System to 1940

Two main lines of action were contemplated in this epoch-marking measure. One was the progressive classification of clerks and other employees—first in the Treasury and Post-Office Departments, and afterwards, as the president should direct, in other departments as well. The second was the extension to all such classified positions of the plan or principle of recruitment by competitive examination. At the outset, the reform did not extend far. In the first year, the number of positions affected did not exceed 14,000 (all in Washington), out of a total national civil service of some 110,000. Gradually, however, the number grew, in Washington and by extension also to some of the field services; so that by 1933, on the eve of Franklin D. Roosevelt's assumption of the presidency, it exceeded 450,000, or some eighty per cent of the entire federal service. Much of the increase was, of course, automatic, arising from the expansion of staffs in branches of the service already on the classified basis. Other gains flowed, however, from occasional acts of Congress placing specified groups of positions, whether new or old, in the classified service,² e.g., an act of 1902 classifying the employees of the Bureau of the Census; and still others from executive orders issued in pursuance of discretionary authority conferred by the Pendleton Act or by supplementary statutes—as, for example, when President Cleveland brought into the classified service numerous positions in the internal revenue service and in the Department of Agriculture, or when President Theodore Roosevelt brought in the rural free-delivery employees and all fourth-class postmasters north of the Ohio and east of the Mississippi. As the Civil Service Reform League repeatedly pointed out, the presidents—perhaps chiefly because of the burdens which political appointments imposed upon them and upon their heads of departments—commonly outran Congress in their desire to see the competitive system extended; Congress, indeed, the League bluntly declared as recently as 1937, was always the chief obstacle to progress.

The classified service and its earlier growth

The assertion is borne out not only by repeated failures of the two houses, when enacting legislation entailing large numbers of appointments, to place the new positions in the classified service, but by actual recessions for which Congress, or at all events members hungry for

Difficulty of holding ground gained

¹ Similar legislation soon followed in Massachusetts and New York, and by this time one could say that the reform movement in American public administration was definitely under way. Three score years, however, have left it short of complete success in the national domain; while even yet only some twenty of the states have enacted service-wide merit laws.

² The term "civil service" is often employed loosely, and by people who should know better, as synonymous with "classified service" or "competitive service." The classified service (under the "merit system") forms, of course, only a fraction of the civil service viewed correctly as embracing all persons in the public employ.

spoils, must be held responsible. Every new presidential administration saw advances on some sectors, but retreats on others—retreats forced on even such sterling friends of the merit principle as Presidents Cleveland, Wilson, and Hoover. Retrogressive pressure was, of course, heaviest at times when a party long out of power suddenly found itself in control, *e.g.*, when the Democrats came in in 1885, 1913, and 1933, the Republicans in 1897 and 1921. And it proved effective, not because presidents and other appointing officers enjoyed the harassing experiences that go with spoils politics, but simply because an apathetic public permitted patronage-mongers in Congress, abetted sometimes by heads of departments who were primarily politicians, to push the merit system back from hard-won positions.

The
problem
of extension
to
the
higher
levels

It goes without saying that the pattern presented by the classified service continued decidedly "spotty"—indeed was still so even under the normal conditions existing before the present war, and despite significant advances to be noted below. Extensions were rarely in accordance with any fixed plan, and recessions introduced further incongruities. For decades, the most obvious, minimum need was a general levelling up whereby all branches and grades of the service comparable with others to which the merit system had been extended should be brought under it likewise. On top of this, however, was the equally urgent need for extending the merit principle to higher levels of the service than had as yet been reached except at a few scattered points. To be sure, certain higher officials, including chiefs of bureaus and divisions, had for a good while been selected for their professional standing and retained in office during good behavior. Even these, however, were protected by no legal guarantees against removal at pleasure; and entire groups of intermediate and higher offices long remained on a frankly political basis—notably in the postal service, the customs service, the internal revenue service, the mint and assay services, the public lands service, the reclamation service, the immigration service, and the field services of the Department of Justice. Every one concedes that officers having to do in any important way with policy-framing ought to continue to be selected with a view to harmonious representation of public opinion—which normally means on a party basis; and, admittedly, candidates for higher posts as a rule cannot be tested, and would not submit themselves for testing, in the same way that potential clerks and typists are examined. In our entire federal executive and administrative system, however, there were—in peacetime—not more than perhaps 1,200 officials who really had to do significantly with determining policy; there are well-known and adequate modes of ascertaining the fitness of candidates, no less for places of heavy responsibility in the government service than for positions of trust in great banking and business establishments; and, as has so often been urged by the Civil Service Commission, the Civil Service Reform League, and other interested and informed people, the whole number, with only

the exceptions mentioned, properly belong in the non-political competitive system.¹ Economy and efficiency throughout the government depend very largely on the capacity and experience of these higher officers; political appointments at these levels have a demoralizing effect on the service from top to bottom; with these superior positions on a political basis, subordinates have little incentive to try to work up, no entirely adequate plan of promotions is possible, and the civil service can hardly be made a career, capable of attracting and retaining men and women of superior caliber.

Chief obstacles to reform on these lines were—and to a degree still are: (1) reluctance of politicians, especially in Congress, to see so much valuable patronage cut off; (2) fear that the party in power would be able to “freeze” the existing situation, assuring permanent tenure for its appointees; and (3) the fact that in the case of some 15,500 “presidential offices,” appointment was made by the president and Senate, so that they could not be brought under the merit system, on the regular lines, without legislation abrogating the Senate’s “advice and consent.” More than one president (including Taft in 1912 and Coolidge in 1924) recommended removal of the last-mentioned difficulty by legislation vesting appointment to the offices in question in the president alone, or in heads of departments—along with abrogation of the four-year term (or other fixed term) where such limitation persisted. But politicians, particularly in the Senate, were always pretty solidly against the proposal.

Obstacles

Franklin D. Roosevelt’s accession to the presidency in 1933, followed by the launching of the New Deal, opened the way for the merit system to be dealt some heavy blows. The Democrats were back in power after twelve lean years, and the rank and file were hungry for offices. Swift creation of new agencies of recovery and reform multiplied sharply the number of positions to be filled. And in the great majority of cases Congress exempted from the competitive system the hordes of new and transferred employees, leaving the way open for spoils at a juncture in the national life when nothing could have been less desirable. To be sure, a few of the new agencies—notably the Tennessee Valley Authority and the Farm Credit Administration—voluntarily decided to operate in accordance with merit principles. But as a result of wholesale exemptions by law, and of spoils raids in a good many of the older establishments as well, the service as a whole so far slipped back that the proportion on a merit basis sank from some eighty per cent early in 1933 to hardly

Retro-
gression
in 1933-
34

¹ For dissent from this general proposition, however, see K. Cole, “The ‘Merit System’ Again,” *Amer. Polit. Sci. Rev.*, XXXI, 695-698 (Aug., 1937); and cf. W. R. Davies, “Why I Believe in the Patronage System,” *Nat. Mun. Rev.*, XIX, 18-21 (Jan., 1930), and W. Turn (a political boss), “In Defense of Patronage,” *Annals of Amer. Acad. of Polit. and Soc. Sci.*, CLXXXIX, 22-28 (Jan., 1937) There is a point of view that in the long run the best results will be attained by placing squarely upon appointing authorities full and unfettered responsibility for selecting personnel; also that the party system—indispensable in a democracy—cannot survive without patronage.

more than sixty-three per cent at the middle of 1937. An atmosphere developed in which the merit system was challenged and endangered as in few earlier periods of its history; indeed, there were efforts to repeal state civil service laws outright.

Renewed
agitation
for
reform

Of course, things could not go thus badly without stirring protest. Outside of government circles, the Civil Service Reform League, the Civil Service Assembly of the United States and Canada, the National League of Women Voters, and other organizations—and inside such circles, the National Legislative Council of Federal Employee Organizations and the Civil Service Commission—campaigns not only for a reversal of the current trend, but for an extension of the merit system to include every non-policy-framing group or grade. In 1937, the President's Committee on Administrative Management declared for extension of the competitive system, not only upward and outward, but also downward, so as to include skilled workmen and laborers; and in the same year, the President himself, who all along had assured the reformers that the system was in no danger at his hands and would be "extended and improved" during his administration, urged upon Congress that all except policy-making positions be placed under merit arrangements.

Progress
in 1938-
40: the
Rams-
peck Act

At the opening of 1938, one would hardly have guessed that the merit system in the federal service was on the eve of its greatest triumphs; yet so it proved. To begin with, the President himself, in that year, ordered into the classified service all previously exempt non-policy-determining positions over which he had the necessary power. The number, to be sure, was relatively small. But in 1940 Congress made up for a good deal of past dereliction by passing a significant measure—the Ramspeck Act—authorizing the chief executive to bring under the merit system a large share of the positions still excepted, giving incumbents classified status provided they (a) were certified as having served satisfactorily at least six months and (b) were successful in passing non-competitive qualifying tests. Under this authority, the all-time largest extension of the classified service took place in the summer of 1941, when at a stroke more than 182,000 persons were transferred. Indeed, the way now seemed open—except in so far as acts of Congress might bar it in the case of particular groups—for throwing the ever-widening boundaries of the merit system around far the greater portion of the federal service, aside, of course, from officials having to do with making policy.¹

¹ A word should be added about the special case of postmasters. Early in the century, fourth-class postmasters, postal clerks, letter-carriers, and other minor postal employees were placed in the classified service, postmasters of the first, second, and third classes, however, being left outside, partly at least because they could be appointed only with confirmation by the Senate. President Wilson bettered the situation by instructing the Civil Service Commission to hold examinations for all such positions and by undertaking to nominate in every case the candidate receiving the highest rating, regardless of politics. President Harding let down the bars to political appointments by reverting to the earlier practice of nominating one of the *three* standing highest, though in 1936 President Roosevelt restored the procedure of President Wilson. Finally, two years later, in the Ramspeck-O'Mahoney Postmaster

The Merit System in Wartime

One of the gravest problems raised by the defense effort launched in 1940, and in still more aggravated form by our involvement in World War II in 1941, has been that of manpower—for the armed services, for industry, for agriculture, and likewise, one hardly need add, for civil services (federal, state, and local). Even the multiplying activities incident to the defense effort necessitated within a year an increase of federal personnel by upwards of half, and from the outset there was fear (although, if the truth be told, hope among some politicians) that the machinery for recruiting, testing, and grading potential employees would not prove equal to the task. The burden thrown upon the Civil Service Commission was, indeed, staggering, the more by reason of heavy losses of existing personnel both to military service and to competitive private industry. Not only, however—by employing every possible channel of publicity in order to attract capable people, by streamlining its procedures, and by drawing upon state and municipal rosters of eligibles placed at federal disposal¹—did the Commission contrive, for a time, to meet the demands upon it, but it succeeded reasonably well in maintaining the merit standards of the past, the competitive system proving stronger in the emergency situation than either friend or foe had anticipated. By 1941, however—with the federal service doubling in numbers prior to Pearl Harbor—concessions had to be made. As early as September of the previous year, President Roosevelt had issued an executive order (similar to one issued by President Wilson in World War I) authorizing the Civil Service Commission, when in its judgment necessary to the best interests of the defense program, to suspend, in relation to any position or classes of positions, the competitive provisions of the Civil Service Act, appointments under such suspensions being without civil service “status” and only for the duration of the emergency; and in 1941 such suspensions became increasingly numerous as the only means by which the civilian defense services could be kept supplied with adequate manpower.

Recruiting for the defense effort, 1940-41

Then came the war, and with it, in time, still another doubling of federal civilian personnel. For obtaining the requisite numbers, many expedients were employed—the task being made vastly more difficult,

Necessary concessions during the war

Act, Congress gave the examination system a statutory basis by placing the then 14,800 first-, second-, and third-class postmasters in the classified service—on a special footing, to be sure, since incumbents continue to be appointed by the president and Senate, yet with indefinite tenure, and with only candidates examined by the Civil Service Commission, and certified as having one of the three highest ratings, eligible to appointment. See *Good Government*, LV, No. 3 (May-June, 1938). Even yet, however, congressmen and senators have a good deal of influence upon selections made from the highest three, and persons without such backing are likely to consider it useless to take the examinations.

¹ Authority to certify eligibles from state registers to fill federal positions, in cases in which the Commission had cooperated in conducting the state examinations, was acquired in 1938.

of course, by the draining off (even from within the civil service itself) of still larger numbers of young men, and women too, into the armed services and their auxiliaries. Intensifying its recruiting program, the Civil Service Commission, in its own language, assiduously "beat the bushes" for people who could be enlisted. Whenever possible, personnel was borrowed from private industry—although the war industries themselves stood in need of millions of new employees. Many thousands of state employees were inducted into federal service, without prejudice to classification or salary. And, under drastic transfer powers given the Civil Service Commission by law, war agencies were furnished still other thousands transferred from federal agencies whose work was not of a defense nature. More and more, it became necessary to subordinate, or entirely suspend, age limits and experience requirements, and, in the more congested areas of the service, to waive various examination procedures completely. And when such expedients failed to meet the insatiable demands of the employing agencies, a new executive order of February 16, 1942, opened a way for "war service" appointments to many categories of positions with only "pass" (as distinguished from competitive) examinations, and without reference to classified status at all, yet carrying tenure, at the Commission's discretion, for the duration of the war and for six months thereafter.¹ Keeping its hand on the general situation as well as it could, the Commission nevertheless was obliged to see the departments and numerous wartime establishments fairly run riot with selection and disposition of much of their personnel; and in 1943 an investigation conducted by Congressman Ramspeck brought to light abuses—especially in the form of over-staffing—which an act of Congress required the director of the budget to seek to remedy, even to the extent of fixing personnel ceilings for given establishments. Combined with a restraining influence exerted by the findings and recommendations of a Joint Committee on the Reduction of Non-Essential Federal Expenditures (Senator Byrd of Virginia, chairman), the Ramspeck investigation contributed to a tapering off in 1943 of the rate at which new federal personnel was being added; and of course this enabled the Civil Service Commission to recover some of its lost control.

For the time being, the looser conditions forced by the emergency undeniably weakened the merit system, and at a juncture when it particularly needed to be strong. The concessions made, however, were only temporary; and one will hardly doubt that in so critical a situation it was more important to secure indispensable manpower (if not the best, then such as could be got) than to insist uncompromisingly upon standards capable of being realized only under more normal conditions. The saving factor was that, in so far as there was a let-down, it was dictated, not by partisanship, but solely by wartime necessity; and although the readjustment will offer difficulties, it is fair to assume that after the

¹ *Federal Register*, Feb. 19, 1942.

war there will be a return to substantially the situation previously existing.¹

Throughout the war period, however, the merit system was not spared attack having partisan motivation. The principal form taken was a series of efforts, starting as early as 1935, to strengthen the interests of patronage by subjecting to senatorial confirmation all appointments in designated agencies, or even all appointments whatsoever, carrying salaries in stipulated amounts—most commonly \$4,500 a year or over.² That nearly every appointee to a post for which the Senate confirms is actually selected by a senator (occasionally by a representative), and for political reasons, is common knowledge in Washington; and in recent years the Senate has been the scene of a determined drive aimed at multiplying opportunities of the kind. Not all senators who have ranged themselves with the spoilsmen have been seeking spoils as such, or for themselves; many have lent their support only because of a desire to curb abuses of authority by members of the executive branch of the government—bureaucratic abuses which, in both branches of Congress, have been widely believed to exist, and warmly resented. To the degree, however, in which the effort should succeed, its effect would be demoralizing, not alone because of the delays that would be entailed and the probably poorer appointments that would result, but especially because of the way in which hope for advancement by merit rather than by political preferment—one of the surest guarantees of efficient service—would be frustrated. In 1942, a rider to a naval appropriation act applied the arrangement mentioned to the War Manpower Commission,³ and another of the kind, tacked on a measure appropriating funds for the Office of Civilian Defense, was deleted in the upper house only by the casting vote of the vice-president.

More ambitious was a bill introduced early in 1943 by Senator McKellar of Tennessee (sponsor of numerous patronage measures in past sessions, including the rider relating to the War Manpower Commission) providing that both appointments and promotions to all posts in the executive civil service paying \$4,500 or more—some 28,000 in number—not only should be confirmed by the Senate, but should be for four-year

Efforts to
weaken
the
merit
system
through
senatorial
confirmation

The McKellar
Bill
(1943)

¹ The federal civil service in wartime is discussed in L. V. Howard and H. A. Bone, *Current American Government* (New York, 1943), Chap. iv; L. V. Howard, "War and the Federal Service," *Amer. Polit. Sci. Rev.*, XXXVI, 916-930 (Oct., 1942); and A. S. Fleming, "Emergency Aspects of Civil Service," *Pub. Admin. Rev.*, I, 25-31 (Autumn, 1940). It may be noted that, solidly entrenched as is the merit system in Great Britain, it proved necessary there also to permit numerous emergency wartime appointments to be made without competitive examination.

² The figure named was selected arbitrarily to mark a dividing line between "officers of the United States," required to be appointed by the president with the advice and consent of the Senate, and "inferior officers," who may be appointed by the president alone or by the head of a department. In occasional proposals, the figures \$5,000 and \$5,500 were employed; and in 1940 the former was actually made operative in the Selective Service and Training Act. An act of 1937, applying the plan to the United States Housing Authority (but not long in effect), stipulated \$7,500.

³ With the result of seriously holding up needed field appointments until the appropriate Senate committees got around to considering them. Fortunately, the proviso lapsed at the end of the fiscal year.

terms only, and including present as well as future incumbents. Over the protest of a minority of the Senate judiciary committee (warmly backed by President Roosevelt), which correctly contended that senatorial confirmation should be restricted to policy-determining officials and not extended to administrative, professional, and technical officers, the measure (with its coverage somewhat reduced, and shorn of the four-year term) was reported out and passed. In the House of Representatives, however, it met defeat. With respect to some matters, *e.g.*, the regulation of lobbying, the Senate has a better record than the House. In connection with the civil service, however—at least of late—the situation is otherwise; although it is only fair to recognize that its constitutional power of confirmation gives the Senate a vested interest not shared by the other branch.¹

An
over-all
advance

Notwithstanding the let-down made inevitable by the war, and also the reactionary tendencies in the Senate just described, the merit system, over a period of years, has realized truly remarkable gains. But the fight to maintain and extend it has to be unremitting. In 1944, there was a serious threat that some 8,500 legal positions, brought into the classified service by executive order in 1941, would be withdrawn from it by congressional action;² and a vigorous, although unsuccessful, attempt was made to prevent inclusion in the service of personnel employed in carrying out a War Mobilization and Reconversion Act concerned with expediting reconversion from wartime to civilian production. Such reactionary efforts are to be expected, and some of them will succeed, at least temporarily. But the greatly enlarged number of civil servants now having classified status (including no small portion of the wartime increment), and the authority enjoyed by the president to add progressively to the number, mark an achievement of the first order in the fight for good government in this country.

Recruitment Under the Merit System

Person-
nel
agencies:

1. The
Civil
Service
Com-
mission

The primary object of the Pendleton Act and of the long line of later statutes and executive orders extending its provisions to additional groups of civil servants is, of course, to promote appointment on a basis of demonstrated fitness and to assure appointees security of tenure during good behavior. And to assist appointing authorities in finding persons qualified for places in the classified service, the law provides for a Civil Service Commission of three members, unattached to any executive department or other agency, and appointed by the president with the advice and consent of the Senate (for no fixed term) under the limitation

¹ The best recent study of senatorial confirmation, in its political as well as other aspects, is A. W. Macmahon, "Senatorial Confirmation," *Pub. Admin. Rev.*, III, 281-296 (Autumn, 1943).

² The threat succeeded to the extent that Congress forbade the Civil Service Commission to use any part of its 1945 appropriations for salaries and expenses of the legal examining unit which had been set up.

that not more than two of the members may be "adherents of the same political party." As time passed and conceptions of personnel administration broadened, the Commission's functions increased, until nowadays it is found not only framing and administering competitive examinations and certifying lists of eligibles, but classifying civil servants, making rules and regulations providing for in-service training, investigating charges of political activity, keeping service records reported to it by the establishments, administering the retirement law, and doing numerous other things related to the upbuilding and improvement of the federal service. Under "war service regulations" embodied in executive orders of 1942, it also has had, at least for the time being, wide authority to transfer employees from one agency to another (or even to private industry) without the consent of either the employee or the agencies affected. A staff of some 6,000 (double the pre-war figure) is maintained; under a wartime reorganization effected in 1942, functions are distributed among divisions such as personnel, personnel classification, examining and personnel utilization, retirement investigations, appeals and review, service records, budget and finance, and information; in principal cities throughout the country are located thirteen regional offices (each under a regional director) and also twelve branch offices; and field organization is completed by more than 5,000 local examining boards, made up of postmasters, collectors of revenue, and other national officers who from time to time are called into special service for this purpose by the Commission, without extra pay, and who hold "assembled," i.e., group, examinations at first- and second-class post-offices—about 150 of the number being rating boards at navy yards, arsenals, and other federal "workshops," charged with conducting chiefly "unassembled," i.e., individual, examinations designed for skilled and unskilled laborers.¹

Within the limits of its powers and resources, the Civil Service Commission has served the country usefully over a long period of years. For some time before the war, however, it was being criticized for frequently being behind in its work, for not maintaining sufficiently close contact with schools and colleges with a view to encouraging more adequate educational preparation for the national service, for neglecting to cultivate coöperating relations with state and municipal commissions, for failure to develop a system of competitive examinations for promotions, and for many other alleged or actual shortcomings. The truth was that, as the President's Committee on Administrative Management freely conceded in its report of 1937, the Commission never had been given adequate financial support, and therefore of necessity was under-staffed. Doubtful, on general principles, about the suitability of boards or commissions for carrying on work of an administrative character, the Com-

A pro-
posed
reorgan-
ization

¹ During the fiscal year ending June 30, 1940 (the last before an abnormal situation was precipitated by the national defense effort), a total of 839,112 persons were examined; 374,890 of the number received a passing grade; and 102,366 obtained appointment. *Annual Report of the U. S. Civil Service Commission* (1940), 131.

mittee, indeed, did not hesitate to recommend a drastic reorganization under which (1) the Commission should be replaced altogether by a single executive officer, to be known as the Civil Service Administrator, appointed by the president and Senate on the basis of open competitive examination, responsible as is the existing Commission exclusively to the president, and charged generally with whatever duties and powers the Commission then had, together with other functions which the new official should be given authority to develop, and (2) a non-salaried Civil Service Board of seven members should be set up, appointed by the president and Senate, drawn from outstanding representatives of business, education, labor, agriculture, and similar interests, and charged with broad functions of observation, investigation, advice, and planning, in the name of the general public.¹ The proposal never was acted upon, and quite possibly never will be; although, in the main, it was revived unofficially in a study of the civil service published in *Fortune* in 1943,² and some of the concepts upon which it was grounded can hardly fail to influence the future development of civil service administration on all levels of government. However, the new burdens thrown on the Commission after 1940 by current enlargement of the peacetime classified service, and especially by mounting wartime demands, convinced Congress of the necessity for far more adequate financial provision; and of late the Commission's budget has been more than three times that of a few years ago. Out of the Commission's hectic wartime experience will undoubtedly come some lasting benefits, among them better financing, more liberal staffing, and closer relations with personnel machinery in states and municipalities.³

2. The Federal Council of Personnel Administration

For the furtherance of personnel work, various executive departments and establishments began a good while ago to appoint personnel directors and other such officials of their own; and an executive order of 1938, revising the Civil Service Commission's rules, prescribed, among other things, that thenceforth a division of personnel supervision and management, under a director, should be maintained in every department and major independent establishment, each director to be appointed, under the merit system, by the department or establishment head. Still further to encourage coördinated attack upon personnel problems, these several agency directors, along with one representative each of the Civil Service Commission and the Bureau of the Budget, and such additional persons

¹ *Report of the President's Committee*, 9-11. For a trenchant criticism of the proposals, see L. Meriam, *Personnel Administration in the Federal Government* (Brookings Institution Pamphlet Series, No. 19, Washington, 1937).

² "Better Bureaucrats," *Fortune*, Supp., Pt. IV, pp. 10-12 (Nov., 1943).

³ On the Commission and its peacetime work, see D. H. Smith, "The United States Civil Service Commission," *Service Monographs*, No. 49 (Baltimore, 1928); also the Commission's annual reports. For complete text of Executive Order No. 7915 of June 24, 1933, revising the rules under which the Commission normally operates, see *Annual Report of the U. S. Civil Service Commission* (1938), 48-58. Most of the new features were aimed at improving the Commission's examining procedures and promoting in-service training for employees.

as the president may name, are linked up in a Federal Council of Personnel Administration which, in 1940 (with the representation of the Commission increased to three) was by executive order made an arm of the Civil Service Commission itself.¹

Officials and employees, high and low, remaining outside the classified service are selected and appointed (chiefly by department heads) as political or other considerations—not, of course, excluding fitness—may dictate. Those within the classified ranks, however, are chosen by methods which it is now desirable that we examine a little more closely. With the exception of relatively few posts filled through non-competitive, or “pass,” examinations,² “classified” appointments are made only on the basis of the showing of candidates in competitive tests. These tests are arranged by the Civil Service Commission, announced in advance in newspapers and on placards displayed in post-offices and other public places, and administered in various cities throughout the country by the examining boards. They may be, either written or unwritten, or both. Candidates for the great bulk of positions of a clerical or other subordinate nature are examined in groups, and exclusively in writing; those seeking positions which call for scientific, technical, or other special attainments—e.g., in the Public Health Service, the Agricultural Research Administration, or the Bureau of Standards—are rated, either competitively or otherwise, in respect to experience, education, training, and fitness, as ascertained usually by interviews and testimony rather than by formal written examination. In the preparation of examination questions, the Commission enlists the aid of experienced persons in the several departments, and occasionally of academic and other outside experts.

The law requires examinations to be “practical in their character,” and, so far as possible, to “relate to those matters which will fairly test the relative capacity and fitness of the persons examined to discharge the duties of the service into which they seek to be appointed.” Herein our American system differs considerably from the British. In Great Britain, the competitive principle operates at higher levels of the official hierarchy than with us; public service is looked upon to a greater extent as a profession, and even a career; and the main object of examinations is to recruit the service (especially that portion of it embraced in the “administrative class”) from young men and women who expect to spend their lives in public employment, and whose education and native ability make it probable that they will rise from one grade to another and steadily grow in usefulness as administrators. Hence, British examinations are

Examinations

Contrast of American and British systems

¹ The chairman of the Council is Mr. Frederick M. Davenport, head of the National Institute of Public Affairs, a private organization which every year, in normal times, places forty or fifty college and university graduates as unpaid internes in various federal establishments. On the activities of the Federal Council, see *Good Government*, LXI, No. 3 (May-June, 1944).

² That is, posts so filled at original appointment, as distinguished from those occupied for the time being by incumbents merely “covered in” (as under the Ramspeck Act of 1940).

framed mainly with a view to testing the candidate's attainments and capacity. Mathematics, history, philosophy, the classics, natural science—these and other branches of higher learning receive much emphasis. Even the examinations for positions of a purely clerical nature are framed on these lines, though naturally confined to more elementary subjects. Under the American plan, the object, in the majority of cases, is not primarily to test general attainments and capacity; rather, it is to ascertain the applicant's technical proficiency and present fitness for the kind of work that he seeks. "There is something to be said, of course, for both systems. The American is more democratic; it exacts little of the beginner in the way of knowledge, and it affords a haven for men and women of all ages who are attracted by its pecuniary rewards, modest though they are. This, however, is about all that can be said for it. The British system is less democratic. But it attracts to the public service men and women who, on the average, not only are younger and more energetic than American appointees, but better fitted by education, and probably native capacity as well, to become increasingly able, useful, and responsible officials."¹ The traditional American approach to the matter is not likely to be given up. To a limited extent, however, we have veered in the direction of the British viewpoint, as when, in 1934, the Civil Service Commission began setting up "registers" for junior professional assistants, with examinations of general rather than specific nature and open only to graduates of colleges and universities.²

Formerly, aliens were permitted to take the examinations, and occasionally they received appointments. Examinations nowadays, however, are open only to citizens, except in the rare event of a lack of citizen applicants. There is no fee; even in peacetime, the number of different examinations for positions of various kinds exceeded 1,700; and normally, although of course not during war, the number of persons examined is far in excess of the number of places to be filled.

Making
appoint-
ments

On the registers of the Civil Service Commission, at Washington and in the offices of the regional directors, are kept the names of all persons who have passed the various examinations with a grade of 70 or above.³ Appointment, of course, withdraws a name from the list; and after a year the name of any person not receiving appointment is stricken off (unless the Commission, preferring not to hold a new examination, extends the period), to be restored only if another examination is passed successfully. When a clerk or stenographer or other employee in the classified service is needed by a department, the Commission supplies the appointing officer with the names of three persons who stand highest in the appropriate

¹ F. A. Ogg, *English Government and Politics* (2nd ed.), 231-232.

² See F. M. Davenport, L. B. Sims, et al., "Political Science and Federal Employment," *Amer. Polit. Sci. Rev.*, XXXV, 304-310 (Apr., 1941).

³ The procedures described in this paragraph are those operating before temporary and confusing changes of many kinds were made necessary by defense and war emergency, and now awaiting revival (in so far as waived) when normal conditions return.

list of eligibles. The officer normally appoints one of the three, and the other two resume their places on the waiting list.¹ If no one of the three is appointed, the officer must be prepared to assign some good reason when asking for more names. By way of a check on the judgment of the examiners and appointing authority, every appointee is placed on probation for a period of six months (a year, in the case of certain positions, if the Commission and department agree). During this time, he can be removed summarily, with no reason assigned except that his work is unsatisfactory. If retained longer, however, he gains "civil service status," with such security of tenure as the law guarantees.² Removals during the probationary period are extremely few—fewer, one may add, than they should be.

In practice, appointments in both the classified and unclassified service are heavily affected by two special procedures for which the laws provide, *i.e.*, veteran preference and geographical distribution. From as far back as the Civil War, honorably discharged veterans, and wives or widows of such, have, under varying regulations, been eligible for civil service positions on terms easier than those otherwise applying; and even before 1941 nearly one-fourth of all new federal appointments were going to "preference eligibles" on this veteran basis. In anticipation of employment difficulties for discharged veterans after the present war, President Roosevelt, early in 1944, reaffirmed the general principle of civil service preference for ex-service men; and at his request, Congress, in the following summer, passed the Scrugham-Starnes (Veterans' Preference) Act,³ not only making veterans exclusively eligible for specified kinds of minor civil service jobs and empowering the president, for five years after the war, to add to the list, but providing also for (1) arbitrarily adding ten points to the earned examination ratings of honorably discharged ex-service men and women with service-connected disabilities, wives of disabled ex-service men, and unmarried widows of ex-service men, (2) placing all such persons at the top of the appropriate registers of eligibles, except in the case of professional or scientific positions paying more than \$3,000 a year, and (3) adding five points to the earned examination ratings of honorably discharged ex-service men and women not disabled. The idea that the nation should suitably compensate those who have risked their lives in its defense, and should take care of those who have incurred physical or mental injury in doing so, is sound. From

Veteran
prefer-
ence

¹ The "rule of three," making it possible for the candidate highest on the list to be passed over in favor of the second or third, is characteristic of the American system. In Great Britain, only one name is submitted and the candidate standing highest can be certain of appointment, barring very unusual circumstances. Of course, it sometimes happens under any system that a person to whom appointment is offered no longer wants it, because, perhaps, of having secured more desirable employment. In such a case, the appointing authority simply turns to another eligible.

² As pointed out above, large numbers of wartime appointees brought into the service through relaxation or suspension of the rules have not received "status" and have claim to their jobs only up to six months after the end of hostilities.

³ *Public Law 359—78th Cong.*

the point of view of good administration, it is, however, unfortunate that we have fallen into the habit of discharging this obligation, not alone by pensions, "bonuses," hospitalization, and the like, but by permitting the civil service to be permeated increasingly with persons whose claims are in many instances foreign to the considerations that ought to govern when public employees are being selected. In view of the unprecedented numbers of ex-service men and women likely to seek employment after the present war in a federal service destined to be reduced sharply in personnel (perhaps to 1,500,000), a very large proportion of new appointees indeed (except to more technical positions) may for years be drawn from the ranks of preference eligibles—especially if the pressure is increased by depression conditions in the country.¹

Apportionment according to population

Another restriction upon the free working of the merit system has arisen from a requirement of the Pendleton Act that has always had a particular appeal for members of Congress with a weakness for patronage, namely, that "as nearly as the conditions of good administration warrant," appointments in the departments and independent offices at Washington shall be apportioned among the several states and territories and the District of Columbia on a basis of population. To be sure, during the present war, this provision has been suspended by law. But there is no reason to doubt that before long it will be revived. Under its workings before 1942, applicants who had profited by veteran preference were, by executive order, not taken into the reckoning; and in any case the rule could be applied in only a rough sort of way, for the reason that eligibles from many Southern and Western states were not sufficiently numerous. Congressmen irritated by the disproportionately large number of posts in the national capital held by residents of Virginia and Maryland introduced plenty of resolutions of inquiry and protest; and final action on the Ramspeck Act of 1940 was delayed several months by wrangling over the matter. As a rule, however, it could be shown that the discrepancy arose from the congressmen's own constituents failing to qualify in adequate numbers, as well as from the tendency of employees in the now populous District to disperse for residential purposes through adjoining areas of the contiguous states. Even as imperfectly applied, the principle of geographical apportionment has resulted, in point of fact, in the appointment of many persons of inferior rating.

Discipline, Removal, Promotion

No lack of disciplinary control

The merit system was introduced not only to improve the methods by which civil servants are selected, but also to afford a security of tenure

¹ It is, of course, not to be overlooked that employment in state and local governments will furnish some additional outlet. Here (in contrast with the national government) there will be an increase of positions after the war. The general subject of veteran preference is discussed at length by J. F. Miller in C. J. Friedrich *et al.*, *Problems of the American Public Service* (New York, 1935), 243-334; on the post-war problem, L. D. White, "Veterans' Preference—A Challenge and an Opportunity," *State Government*, XVII, 459-461, 469-472 (Dec., 1944).

never enjoyed under the sway of spoilsmen. Opponents of the reform sought to discredit it by arguing that protected employees, feeling themselves safe, would grow careless and inefficient. There was no intention, of course, that such results should be permitted to follow; and while it is probably true that governments are, on the whole, more lenient with those who serve them in civil capacity than are private businesses with persons on their payrolls, the regulations applying to our national service (both classified and otherwise) contemplate full powers of discipline and removal—so long, in the case of the classified service (says one of the rules), as “like penalties shall be imposed for like offenses, and no discrimination shall be exercised for political or religious reasons.”¹ Every member of the service is liable to disciplinary action at the hands of some superior authority; and such action may range all the way from mere reprimand to suspension (not to exceed seventy days), reduction in rank and pay, and, in extremest cases, removal.

For it must be noted that development of the merit system has in no wise abrogated the judicially established principle that the power to appoint normally carries with it the power to remove. What the rules (statutory or otherwise) do is merely to give merit appointees protection against arbitrary and unreasonable removals, such as officials outside the classified service have no legal ground for claiming. In the main, this protection consists in requiring that removals shall be made only—as an act of 1912 puts it—“for such cause as will promote the efficiency of the service,” that refusal to contribute time or money to a political party (or, on the other hand, making a contribution, of money at all events) shall in no case be ground for removal, and that removals shall be made in a manner essentially fair to the employee involved. Fairness is construed to require that the employee be furnished with a written statement of the charges against him and that he be allowed reasonable time in which to make a written reply.² Unlike employees under most state and municipal civil service systems, however, he has no right to an oral hearing or trial before dismissal takes effect, although he may be allowed one as a matter of grace; nor can he expect any court to intervene in his behalf. Within the substantive and procedural limitations thus imposed, the appointing authority (the head of a department in the great majority of cases) can sever from that part of the service within his jurisdiction any person whom he judges to be incompetent, dishonest, disloyal, or otherwise a hindrance to good administration.³

¹ Rule XII, § 2.

² Rule XII, § 1. Cf. H. C. Westwood, “The ‘Right’ of an Employee of the United States Against Arbitrary Discharge,” *Geo. Washington Law. Rev.*, VII, 212-232 (Dec., 1938).

³ The international situation of recent years, and particularly the war, inevitably brought to the fore the matter of disloyalty and subversive activities within the service. Proceeding on lines of extremely doubtful constitutionality, Congress tried its hand at purging the service of members alleged to be guilty of subversive activities, but ended with only a dubious action undertaking to separate three persons from the federal payroll (see p. 361 above). Two successive interdepartmental com-

Immunity
from
partisan
pressures

Included in the protection thrown around members of the classified service is immunity from pressures of a partisan nature. By terms of the Pendleton Act, no classified officer or employee may be solicited anywhere for political funds by a congressman, senator, or federal office-holder—or indeed by any person whatever within a building used by the federal government. There is nothing to prevent such solicitation by non-office-holders, so long as they do not invade a government building for the purpose, and sometimes officers and employees are in this way practically coerced into making contributions. No one, however, may be removed, demoted, or even threatened, by his superior either for making or for refusing to make a political contribution.

Re-
straints
upon
partisan
activities

In return, members of the service—although, of course, permitted to vote,¹ and likewise to express privately their opinions on political issues—are required to abstain from activities of a partisan character. From 1907, a rule, based on an executive order, has forbidden members of the classified service to take any “active part in political management or in political campaigns”—a regulation construed by the Civil Service Commission to debar them from membership in party conventions, addressing party gatherings, participating in the preparation of party resolutions or platforms, serving on party committees, assisting in getting out the voters on election day, serving as election officers, distributing campaign literature or emblems, arranging party meetings or demonstrations, publishing anything in the interest of a particular candidate or party, and a long list of other activities having a partisan aspect—although not including mere passive attendance at party meetings or making contributions to party funds through persons not connected with the federal government. And, although the Commission (itself largely without power of removal²) long complained that infractions which it looked into and reported were frequently ignored by the authorities, *e.g.*, department heads having power to remove, partisan abuses at the hands of federal civil servants in times past must, in the main, be laid at the door, not

mittees carried on laborious inquiries into large numbers of charges made against individual employees, but came out with results of so negative a character that the committees themselves pronounced their work not worth while. Finally, the Civil Service Commission, throughout the war period, looked into numerous cases involving persons admitted to the service on a temporary basis subject to later investigation and certification. The total of removals has, however, not been large. For a full and authoritative discussion of the entire matter, see R. E. Cushman, “The Purge of Federal Employees Accused of Disloyalty,” *Pub. Admin. Rev.*, III, 297-316 (Autumn, 1943). In 1944, the Civil Service Commission set up a loyalty rating board to investigate applicants for civil service positions whose loyalty is called in question.

¹ Many, however, are non-voters because of having no residence except in the District of Columbia. See p. 714 below.

² Except in the case of its own employees. A widespread impression that the Commission has general power to dismiss civil servants is erroneous. Employees admitted temporarily and subject to later investigation can be discharged by the Commission if the results of the investigation prove unsatisfactory. But once a person is in the service with permanent status, the Commission cannot, of its own motion, get him out—unless it can show that he secured status by misrepresentation or other fraudulent means.

of the classified service, but of that portion of the service remaining on a political basis.

To meet this situation, Congress, in 1939, passed the first Hatch Act,¹ designed to prevent "pernicious political activities" on the part, not only of classified federal employees, but of *all* federal employees except only those occupying policy-determining positions. To be sure, restrictions upon soliciting political contributions from classified civil servants were not carried over to the unclassified. But—aside from persons covered by the exception mentioned—all officers and employees of the United States, classified and unclassified alike, were forbidden to take any active part in political management or political campaigns, or to use their official authority with a view to affecting in any way "the election or nomination of any candidate" for a federal office. Officials in the non-classified service may, to be sure, publicly voice their opinions on political subjects and candidates, provided (the attorney-general has ruled) they do it "not as part of an organized campaign"; members of the classified service may express such opinions only privately. And the act is construed to forbid every civil servant to whom it applies to become a candidate for any elective state, territorial, or municipal office—at all events, if campaigning is involved.²

The
Hatch
Act of
1939

When approving this legislation, President Roosevelt called attention to the fact that it applied to officers and employees of the federal government only, and recommended that it be extended to cover "state and local government employees participating actively in federal elections." The upshot was a second Hatch Act,³ in 1940, (1) forbidding employees of state and local governments, if engaged in full-time activities financed wholly or in part by federal funds, to use their official authority in such ways as to interfere with any presidential or congressional nomination or election, and (2) forbidding any persons whose *principal* employment is in a federally aided activity (a) to use official authority or influence for the purpose of interfering with any federal nomination or election, (b) to coerce, command, or advise any other such employee to make a political contribution or loan,⁴ and (c) to take any active part in political management or a political campaign.⁵ Not so long ago, the number of

The
Hatch
Act of
1940

¹ 53 U. S. Stat. at Large, 1197.

² Advantage was taken of this legislation to incorporate a section forbidding any federal officer or employee to advocate overthrow of the constitutional form of government or to be a member of any political party or organization doing so.

In 1914, when twelve members of the United Federal Workers of America (a C.I.O.-affiliated organization of federal employees) brought an action to test the constitutionality of the prohibitions upon political activity contained in this first Hatch Act, the U. S. District Court for the District of Columbia fully upheld the provisions' validity.

³ 54 U. S. Stat. at Large, 767.

⁴ This added restriction of a financial nature constitutes the only significant difference between the regulations applying to the body of employees here dealt with and those applied to regular federal employees by the first Hatch Act.

⁵ The second Hatch Act was notable also for its drastic changes in the regulations governing the collection of campaign funds. This feature, however, has been treated elsewhere (see pp. 196-197 above).

persons affected by legislation on these lines would not have been large. The enormously increased interlocking personnel of federal, state, and local governments incident to New Deal undertakings and to defense and war activities has, however, brought some hundreds of thousands of state and municipal employees into a position to feel the force of the new restrictive measures.

Some
hair-line
interpre-
tations

In the case of regular federal employees, the principal difficulty arising from the Hatch legislation is that of interpreting the meaning and scope of "political activities"; and some more or less arbitrary decisions have had to be made. Thus, a federal employee may not serve as a delegate to a party convention,¹ and if present as a spectator must take no part in deliberations or demonstrations, yet he may not only attend a primary meeting or a caucus but speak and vote; an official may belong to a political club, but may take no part in its activities; if in the unclassified service, he (as indicated above) may express political opinions publicly, but not as a participant in a campaign; he may not pass out campaign buttons or badges, but may wear either. The second Hatch measure offers the additional difficulty of determining what persons are covered, and how much of the time—a difficulty arising chiefly at the point where the law makes its restrictions applicable to persons whose "principal employment" is a federally aided state or local activity. Take, as a single illustration, the case of state highway commissioners. As a rule, such commissioners give only a small portion of their time to the work of the highway commission; the remainder they devote to their other interests, as farmers, shopkeepers, and what not. Are they not therefore exempt from the Hatch Act's provisions? The Civil Service Commission has said that they are not—on the ground that their principal *state employment* is with an activity financed wholly or in part from federal funds. However, concedes the Commission, such commissioners are affected by the act only during the time while they are actually engaged in state highway work—which means that during some days of the year they may not engage in political activities and during the remainder they may do so as freely as they like. The same curious situation exists, of course, in the case of the part-time members of all state boards and similar agencies where federal funds are involved. Even minor employees working on a *per diem* basis are similarly covered—and similarly exempted.² Full au-

¹ At a stroke, the notoriously heavy participation of federal office-holders in national and state party conventions—always a great advantage to any party in power, and to the "Administration" as against other interests in the party—became a thing of the past. More than fifty per cent of the members of the Democratic national convention which renominated President Roosevelt at Philadelphia in 1936 were postmasters, marshals, revenue collectors, district attorneys, and other federal officials. Some votes in Congress for the Hatch legislation were motivated by no loftier purpose than to make it more difficult for Mr. Roosevelt to control the 1940 convention and perchance to win a nomination for a third term.

² Controversy having arisen over whether teachers in land-grant colleges and in vocational schools receiving federal funds were covered by the legislation, Congress, in 1942, passed an act expressly exempting them from many, although not all, of the law's provisions.

thority, not only to decide matters like these, but also to inquire into every alleged violation of the law, is vested in the Civil Service Commission, and every federal agency through which funds are dispensed to the states or to local units is held responsible for reporting to the Commission all delinquencies discovered or suspected within its domain.¹ If, on being informed of the guilt of any one of its employees, a state or local agency does not dismiss him, the federal agency controlling the grants or loans must withhold a sum amounting to double the offender's salary.

To regard either the foregoing or any other "clean politics" legislation as capable of completely eliminating "pernicious political activities" would, of course, be naïve; and, not only have there been violations of the new laws, but efforts have several times been made to weaken them by qualifications and exemptions, with the more or less openly avowed purpose of eventually bringing about their repeal. When, however, one recalls the scandalous political activities of federal office-holders in the elections of 1934, 1936, and 1938 (especially in the form of seeking to herd relief workers to the polls), and likewise the brazen public assertions of certain among them that people on the federal payroll must "stick together" and "keep their friends in power,"² one realizes that in the past half-dozen years a notable new chapter in the history of American political reform has been written. It is to be hoped that reactionary and self-seeking politicians will not be permitted to erase it.³

In the business and professional world, it is recognized that nothing contributes more to the efficiency and morale of a staff than reasonable assurance of advancement in rank and pay, not according to mere seniority, but under flexible arrangements placing a premium on meritorious service. The same holds true in public administration, even though the fact has not always been so clearly perceived. No aspect of our American civil service (national, state, and municipal) has, however, given more trouble; two major special committees which during 1941-43 made extensive studies of the federal service concurred in the opinion

Promotion—an unsolved problem

¹ The question of whether the federal government can validly curtail the political activities of employees of state and local governments in the manner provided for in the Hatch legislation remains to be finally determined judicially. Inasmuch, however, as federal grants to states are made almost invariably on a basis of conditions stipulated from Washington, there seems no good reason why restraints upon political activities of employees may not be added to other requirements imposed; and apparently this was the view of a United States district court in New York which in 1944 pronounced the legislation constitutional.

² It was largely by way of reaction against the unhappy experiences of this period that Congress and the president were brought to the point of action in 1939-40.

³ For a fuller analysis of the Hatch Acts and some of the questions arising under them, see L. V. Howard, "Federal Restrictions on the Political Activity of Government Employees," *Amer. Polit. Sci. Rev.*, XXXV, 470-489 (June, 1941), and J. R., Starr, "The Hatch Act—An Interpretation," *Nat. Mun. Rev.*, XXX, 418-425 (July, 1941). Cf. V. O. Key, Jr., "The Hatch Act Extension and Federal-State Relations," *Pub. Personnel Rev.*, I, 30-35 (Oct., 1940); U. S. Civil Service Commission, *Interpretation of the Hatch Act and Regulation of Political Activity* (Washington, 1940), and *Political Activity and Political Assessments of Federal Office-Holders and Employees* (Washington, 1944)..

that the problem has not yet been solved, and in urging that, in the interest of employee morale, a "sound promotion system" be adopted and the Civil Service Commission made responsible for watching over its operation.¹ There is even disagreement as to the extent to which a "closed" system, *i.e.*, one under which positions of higher grade are filled from within the service, is to be preferred to an "open" system, under which such posts are filled either from within the service or by bringing in persons from the outside. In the Pendleton Act, we read that no classified officer or employee shall be promoted "until he has passed an examination, or is shown to be specially exempted from such examination"; and a supplementary rule promulgated by the president enjoins that "competitive tests or examinations shall, as far as practicable and useful, be established to test fitness for promotion in the classified service." Even these regulations recognize that promotion cannot be made a simple automatic matter of examination; and experience has taught that, however useful examinations for the purpose may sometimes prove, the fairest and best basis for promotions is likely to be—as a national Committee on Civil Service Improvement affirmed in its report of 1941—not formal examinations, however searching, but actual records of employees' competence, diligence, resourcefulness, and fidelity, checked by the observation and judgment of their superiors. Two great obstacles, however, arise: (1) the circumstance that under our scheme of recruitment, placing relatively little stress upon broad capacity and promise, there is sometimes only a scant reservoir of talent within a given branch of the service upon which to draw when places of considerable importance are to be filled; and (2) the fact that, notwithstanding the recent notable extension of the merit system into higher levels of the service, many attractive positions toward the top remain unclassified, are filled by political appointment, and hence are beyond the hopes and ambitions of "career men," however capable and experienced. In actual practice, the selection of persons for advancement, in the staffs at Washington as well as throughout the country, is commonly at the discretion of administrative chiefs, with such regard for efficiency ratings—compiled in the establishments and reported to the Civil Service Commission—as they may care to show.²

Classification, Pay, Retirement

Former
haphaz-
ard con-
ditions

Another problem which, in spite of some progress, still awaits full solution is that of pay. For decades, Congress, when creating new positions, provided for compensation without much reference to orderly salary schedules, and as a consequence persons doing the same kind of work

¹ The Byrd and Ramspeck committees, mentioned previously.

² Under terms of the Ramspeck Act, there is now in every department and establishment a board of review charged with passing upon the merits of efficiency ratings given employees. In each case, one member of the board is named by the Civil Service Commission, one by the department head, and one by the department employees.

equally well received widely differing compensation, holders of superior positions in one department or bureau were paid less than inferiors in a different one, women were paid less than men for doing the same kind and amount of work; and while in most branches beginners were paid with reasonable liberality, compensation in the higher ranks was not only uneven from branch to branch, but as a rule distinctly below that received by employees of equivalent experience in private business—indeed, in the case of most supervisory and technical posts, absurdly low. Needless to say, the situation stirred deep discontent among employees, impaired their morale, and diminished such attractiveness as the public service possessed for young men of ability and ambition.

As long ago as 1923, Congress passed a Salary Classification Act under which a Personnel Classification Board inventoried the competitive service in the District of Columbia, grouping into classes all positions involving the same types of work, and assigning appropriate salary ranges (with equal pay for men and women), within limits fixed by the act, to each grade or class.¹ Under later amendments, the board became responsible for extending its work to the entire nation-wide service. Harassed by wasteful controversies, it, however, made almost no headway with this larger task, and in 1932 its precarious existence was terminated. In later years, a few branches, chiefly the foreign and postal services, received suitable classifications of their own by statute. But outside of this, there was still, when the Ramspeck Act of 1940 was passed, no adequate classification system applying to more than some 80,000 positions in the District of Columbia. In the statute mentioned, the president was authorized to see that the work of classifying the field service was resumed. Before much could be done, however, the Civil Service Commission was overwhelmed by the emergency conditions associated with the defense effort and the war; and when, in 1942, the Commission was given a new mandate on the subject, the purpose was rather to procure a reclassification in accordance with more or less temporary wartime conditions, and aimed especially at facilitating transfers and eliminating "pirating" by better situated agencies at the expense of others not so favorably fixed. Once the service is back on a peacetime basis, the entire problem will have to be attacked afresh.

In its report of 1937,² the President's Committee on Administrative Management laid great stress on the need for a distinctly higher scale of compensation, not only for officials such as department heads and bureau chiefs, but for the rank and file as well. With matters as they were, the Commission said, people of large ability steered clear of the service because the top salaries were too low; competent men were continually being drawn off into private employment; and poorly paid

The slow
progress
of class-
fication

The
question
of higher
pay

¹ 43 U. S. Stat. at Large, 950; *Annual Report of the U. S. Civil Service Commission* (1923), 127-135.

² Pp. 11-13.

officials were tempted to cater to special interests in the hope of opening up better opportunities. In the lowest levels, compensation compared rather well with that to be secured at the hands of private business; a study made in 1932 showed that the average remuneration in the federal government was about \$1,500 a year, while in the whole of industry it was about \$1,200. But from perhaps the \$2,500 level, the comparison became increasingly unfavorable; and in the higher professional and technical branches the differential was wide.¹ No one would expect the government to match the salary scales of great banks and corporations; and it can always capitalize on certain advantages of public employment which tend to offset lower pay. The point seems well taken, however, that considerations both of efficiency and of prestige require it to reward talent generously enough to attract and hold it as the highest sort of investment in the public interest.²

Develop-
ments
since
1940

In the national emergency starting in 1940, the problem became especially acute. With private industry reaching out for literally millions of new employees and paying them generously, high-grade civil servants proved increasingly difficult to obtain and experienced older ones hard to hold. To meet the situation (in its pre-war phases), Congress, in 1941, passed a Salary Adjustment Act opening the way for periodic salary increases for substantially all federal officials and employees occupying permanent positions within the scope of the compensation schedules fixed by the Classification Act of 1923, and not having attained the maximum rate of pay for the grade to which their positions were allocated;³ and under this legislation many thousands of salary readjustments took place. Some of the difficulties encountered in recruiting the enormously increased numbers of civil servants required after war began have been mentioned elsewhere. Among them, of course, was low pay in a period of rising living costs, which at the same time was stirring discontent among people already in the service. While demands mounted, Congress marked time. But at length, in December, 1942, a temporary measure was passed lengthening the work-week of an estimated million and a half civil servants to forty-eight hours and providing for either (a) time and a half over-time compensation for work in excess of forty hours a week (the over-time to be based on that part of the employee's salary below \$2,900 a year, with total compensation not to exceed \$5,000), or (b) in the case of employees whose work did not lend itself to an over-time schedule, a flat ten per cent increase. On the basis of a forty-

¹ A comparison of the salaries paid in comparable positions by the federal government and by private industry a decade ago will be found in G. Creel, "Public Wage Slaves," *Collier's*, XCVII, 14 ff. (Mar. 28, 1936).

² "A man primarily interested in making money has no business in public service, and to men who belong in it, its intangible rewards are sufficient to compensate for extra money sacrificed. But an able public servant should be paid enough to support his family on a scale reasonably commensurate with the importance of his position. And his pay should be high enough to serve as a mark of public respect for his profession." *Fortune*, XXVIII, 11 (Nov., 1943).

³ The Ramspeck-Mead Act, 55 *U. S. Stat. at Large*, 613.

eight-hour week, the effect of the over-time provisions was to yield approximately a twenty per cent pay increase. By its own terms, the measure expired in April, 1943; but, with the war still in progress, a new Permanent War Pay Act was placed on the statute-book, removing the \$5,000 limitation mentioned above and giving employees not under the overtime system an additional fifteen per cent, instead of ten. It goes without saying that the arrangements described will not long outlast the war. More than likely, however, they will leave some result in a permanently higher scale of civil-servant pay; and if they do this, they will have contributed to a change which many students of the subject have long considered prerequisite to raising the level of capacity and achievement in the service.

Under any scale of compensation thus far prevailing, or likely to be adopted, the great majority of civil servants cannot be expected to put aside much for a rainy day—still less to provide in any adequate manner for old age; and the only satisfactory way of enabling them to be separated from the service, after they have passed their prime, without becoming dependents or public charges is to make them beneficiaries of a system of retirement pensions. From early in the country's history, Congress was generous, and sometimes prodigal, in pensioning war veterans and their dependents. On the other hand, it did not get around to making provision for civil service pensions until some twenty-five years ago. Under a Civil Service Retirement Act of 1920 (amended in 1926, 1930, and 1942), however, we now have a compulsory part-contributory pension system applying originally to members of the classified service only, but later extended to large portions of the unclassified service as well. Five per cent of the salary or other pay of every person covered is deducted; the government adds interest on the accumulated sums; and from the "retirement and disability fund" thus created retiring annuities and disability allowances are paid on a scale determined by law. As liberalized in 1930, the system gives all beneficiaries reasonable assurance against dependency in ill health and old age, and brings the United States abreast of the more advanced countries in making provision for the multitude of men and women who spend their lives doing the government's routine work, many of them with little or no prospect of promotion or other betterment.¹

²
Retire-
ment and
pensions

¹ Formerly, the retirement age for railway postal clerks and certain other groups was sixty-two; for city and rural letter-carriers, post-office clerks, and other specified groups, sixty-five; and for other employees, seventy. In line with a long-standing recommendation of the Civil Service Commission, however, Congress in 1942 fixed seventy as the uniform age limit for compulsory retirement. After thirty years' service, employees may retire voluntarily at sixty, and after fifteen years' service, at sixty-two. The government may retire them at these ages without their consent, but with right of the employee to ask for a review of his case by the Civil Service Commission.

The Organization of Federal Employees

right
organ-
ized

As the country's largest employer, the national government encounters questions of labor relations and labor policy not unlike those confronting corporations and other private employers; and among these are problems raised by the unionizing of civil servants for purposes of collective action and benefit. Organization of federal employees started more than fifty years ago, and naturally enough in the postal service, considering the bad working conditions prevailing therein, and also the close resemblance of that service to private business. Letter-carriers organized nationally in 1889, post-office clerks in 1890, railway mail clerks in 1891, rural letter-carriers in 1903. At first, the resulting associations, having chiefly a fraternal aspect, were encouraged, indeed largely controlled, by the superior officers of the Post-Office Department. When, however, about 1898, they began trying to put pressure upon Congress to raise the level of pay throughout the service, they lost favor with the authorities; and in 1902 President Theodore Roosevelt issued an executive order forbidding all federal officers and employees, on penalty of dismissal from the government service, "either directly or indirectly, individually or through associations, to solicit an increase of pay or to influence or attempt to influence, in their own interest, any other legislation whatever... save through the heads of departments under or in which they serve."¹ Even after being made more stringent in 1908, this "gag" order proved only partially effective. Nevertheless, it stirred so much complaint that in 1912 Congress passed an act, strongly backed by the American Federation of Labor, unconditionally recognizing the right of federal employees to petition Congress or any member thereof, guaranteeing that membership in employee organizations designed to improve working conditions (including pay) should not be made ground for dismissal or demotion, and conceding the right of the organizations to affiliate with labor unions outside of the public service, so long as such relationship did not impose any "obligation or duty... to engage in any strike or... to assist... in any strike against the United States."² Framed with reference primarily to the postal service (for it was only in the period of the first World War that federal employees outside of that service began to organize on any considerable scale), this measure voices the policy of the government in connection with all parts of the civil establishment at the present day,

Existing
organiza-
tions and
their ac-
tivities

Since 1917, the organization of federal employees has gone forward fairly rapidly. Nine different groups of postal workers now have their own nation-wide organizations, enlisting in some instances as much as nine-tenths of their potential strength.³ A National Federation of Federal

¹ *Nineteenth Annual Report of the U. S. Civil Service Commission* (1902), 75.

² 37 *U. S. Stat. at Large*, 555.

³ In pre-war days, the upwards of 300,000 postal officials and employees formed by far the largest functional group in the federal service. Perhaps the same will again be true, once the service returns to a normal basis.

Employees, formed in the year mentioned, links up more than six hundred local unions of federal employees, composed of persons engaged in various services outside of the separately organized postal branch; an American Federation of Government Employees, originating in a secession from the National Federation in 1932, has grown rapidly, especially among employees of agencies of New Deal antecedents; the same is true of the United Federal Workers of America (affiliated with the C.I.O.), which came into the picture in 1937; and, notwithstanding the opinion of many people that such relationships should not be permitted (they have not been in Great Britain since 1927), thousands of employees engaged in mechanical trades, *e.g.*, printers, carpenters, and plumbers, belong to the regular unions maintained by their privately employed fellow-craftsmen.

Naturally, the service associations are concerned first of all with salary scales, hours, retirement rights, and other matters relating to the status of their own members, and secondarily with improvements at the same points for other service groups as well. Naturally, too, the demands which they make sometimes run counter to the general public interest. As a rule, however, they can be counted upon to endorse merit principles¹ and to promote employee morale, and sometimes they show genuine interest in improving the quality of work performed by their members. Undoubtedly they have helped secure better working conditions for many groups of employees, the National Federation contributing heavily to adoption of the Retirement Act of 1920 and the Classification Act of 1923. The things for which the organizations are criticized most frequently and severely are their lobbying activities in Washington in behalf of bills in which they are interested,² their occasional excursions into politics (chiefly by way of working covertly against unfriendly congressmen seeking reelection), and their relations with labor organizations outside the service, mainly the American Federation of Labor—although it must be added not only that the National Federation severed all connection with the A. F. of L. in 1931,³ but that the no-strike pledge contained in the constitutions of most of the organizations has been kept faithfully, so that our government has almost wholly escaped defiance of its authority by its own employees such as has at times seriously embarrassed the governments of France, Italy, and other European countries.⁴

¹ The National Federation of Federal Employees and the American Federation of Government Employees warmly supported the efforts leading up to the Ramspeck Act of 1940.

² E. P. Herring, *Group Representation Before Congress*, Chap. ix.

³ The American Federation is, however, affiliated. Indeed, it came into being, encouraged by the A. F. of L., because of the National Federation's withdrawal from that organization.

⁴ During 1940-41, however, a number of employer associations voiced "claims" and "rights" patterned after those defined for trade unions in private industry by the National Labor Relations Act, and talk in employee circles about collective bargaining and closed shop assumed such proportions as to influence the National Civil Service Reform League to set up a committee to study the development. See *Good Government*, LVIII, 21-23 (May-June, 1941). Indeed, with assurances of full support

An un-
finished
task

A great deal of water has gone over the dam since genuine civil service reform had its beginning, some sixty years ago. The wartime picture is of necessity blurred, and a let-down at many points has been unavoidable. Nevertheless, the larger part of the federal personnel—even as swollen by the war—has been placed on a merit basis, and techniques of personnel management have been greatly improved. Even a hasty reading of the foregoing survey, however, will suggest that a long road remains to be travelled before our civil service arrangements and procedures can be pronounced wholly satisfactory. We have the distinction of being the first large country in the world to develop a public service based, not on class or caste, but on broad principles of democracy. For this, we have paid a price, however, in the form of the spoils system, with its resulting inefficiency and waste. For a good while, we have been trying to rid ourselves of this incubus. But, though narrowed in scope, the system is still with us on the federal level, and in any case the battle can in no sense be regarded as won as long as the system remains entrenched in over half of the states and in a far larger proportion of counties and cities. On the federal level at least, we have made only a beginning, too, toward solution of many of the problems of nation-wide classification and pay-schedules, of efficiency standards and ratings, of promotions, and, in general, of management-employee relations.

Effective handling of matters such as these would help meet the greatest need of all, *i.e.*, that for surrounding the service with conditions calculated to attract into it a larger number of talented young men and women aspiring to make it a career. Our experience with spoils politics caused us for half a century to think of civil service reform in hardly more than a negative sort of way, *i.e.*, in terms of frustrating the spoilsman, while the more positive objective of enabling the public services to get their full share of talented, and perhaps experienced, recruits was pretty much lost to view. It has been largely responsible, too, for the widespread, but essentially false, concept of the public employee as "a 'tax-eater,' a 'pay-roller,' as inefficient and perhaps corrupt, as an overpaid and underworked parasite."¹ The battle with the spoilsman cannot be relaxed. But the road to opportunity in the federal and other

from the C. I. O., the biennial convention of state, county, and municipal workers held at Lansing, Michigan, in September, 1941, set in motion a nation-wide campaign aimed at extending to the millions of government workers throughout the country all the collective bargaining rights enjoyed by employees in private industry. See p. 607 below.

The most recent full discussion of the organization of public (including federal) employees will be found in G. R. Clapp *et al.*, *Employee Relations in the Public Service*, cited on p. 450 below. See S. D. Spero, *The Labor Movement in a Government Industry; A Study of Employee Organization in the Postal Service* (New York, 1924); E. L. Johnson, "General Unions in the Federal Service," *Jour. of Politics*, II, 23-56 (Feb., 1940); D. Ziskind, *One Thousand Strikes of Government Employees* (New York, 1940), relating chiefly to strikes in local-government areas; R. N. Baldwin, H. E. Kaplan, and S. D. Spero, "Have Public Employees the Right to Strike?," *Nat. Mun. Rev.*, XXX, 515-528 (Sept., 1941).

¹ National Civil Service Reform League, *Annual Report, 1943* (New York, 1944), 4.

services must be made smoother and more alluring—by more positive and effective education pointed in that direction, by better examining techniques, by higher pay, by opportunities for extensive and intensive training after entering service,¹ by a system of promotions inviting greater confidence, and in other ways which will readily occur to readers of the foregoing pages. Studies made some years ago indicate that the “prestige value” of the federal service, while still low enough, is higher than that of state and municipal services—in other words, that the public has more respect for and confidence in the national service than in the others.² Too long, however, the impression prevailed (and not without reason) that appointment to even the federal service led nowhere and, except as a makeshift, was to be shunned by young people of energy, ambition, and capacity. Today, the situation is changing. Increased opportunities for advancement to higher levels in the service have been opened; the importance of administration as a branch of government was never more fully appreciated; the subject, in all of its aspects, has never been studied with equal intensity by officials, investigating commissions, research bureaus, and—quite as significantly—teachers and students in colleges and universities. From an almost uniform attitude of indifference, openly encouraged by vocational advisers, the collegiate youth of the country is being stirred to genuine interest, not only in administration as a subject of academic study, but in public service as a personal challenge and opportunity. There is no more hopeful sign than this; for it is the young men trained at Oxford, Cambridge, London, and more recently the provincial universities, who have brought the British civil service to its recognized rating as the best that the world has known.³

¹ E. Brooks, *In-service Training of Federal Employees* (Chicago, 1939).

² L. D. White, “Politics and Public Service,” *Annals of Amer. Acad. of Polit. and Soc. Sci.*, CLXIX, 87-90 (Sept., 1933). Cf. the same author’s *Prestige Value of Public Employment* (Chicago, 1929), and *Further Contributions to the Prestige Value of Public Employment* (Chicago, 1932).

³ In the past two decades, a long list of American universities and colleges have developed facilities—courses, programs, fellowships, etc.—for training for public service, on either a pre-entry or an in-service basis—developments which will be found surveyed and interpreted at length in G. A. Graham, *Education for Public Administration* (Chicago, 1941). As noted above, the National Institute of Public Affairs in Washington annually awards scholarships for training at the national capital. Various conferences on the subject have been held, notably one at the University of Minnesota in 1931, resulting in a volume entitled *University Training for the Public Service* (Minneapolis, 1932), in which appears, along with the proceedings, a full description of the opportunities available and training required for the 18,000 federal positions at that time held by college-trained men and women. A full list of references will be found in D. C. Culver, *Training for Public Service; A Bibliography* (Berkeley, 1937). Cf. M. B. Lambie, *Training for the Public Service* (Chicago, 1935); L. Meriam, *Public Service and Special Training* (Chicago, 1936), discounting emphasis on university training: O. G. Stahl, “Public Service Training in Universities,” *Amer. Polit. Sci. Rev.*, XXXI, 870-878 (Oct., 1937); M. E. Dimock, “The Potential Incentive of Public Employment,” *ibid.*, XXVIII, 628-636 (Aug., 1933).

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CHAPTER XXIII

✓ THE NATIONAL JUDICIARY

The crowning defect of the government under the Articles of Confederation, wrote Alexander Hamilton in *The Federalist*,¹ was the "want of a judicial power"; and in providing for "a more perfect union" the framers of the constitution declared in the preamble their purpose to "establish justice," and made provision in the third article for a system of national courts complete in itself, separate from the state courts, and deriving existence and jurisdiction solely from the national constitution and statutes.

Why an independent judicial system

If to "establish justice" meant to insure the security of rights under the national constitution, it was essential to have national laws and treaties administered uniformly throughout the country as the "supreme law of the land." And this could be attained only through a series of tribunals established and maintained by the same authority that enacts the laws and makes the treaties. If the interpretation of the national constitution, laws, and treaties had been left to the courts of the several states, we might have had as many different final interpretations as there are states. Inasmuch, too, as the control of foreign relations is vested exclusively in the national government, it was essential that any legal controversies concerning the status or rights of ambassadors and other representatives of foreign governments should be determined in courts created by the same authority that would be held responsible by those governments for any violations of the law of nations, namely, the national government, rather than in courts deriving their authority from the state governments, with which foreign nations can have no direct dealings. Still further, in case the national government should itself become a party to a lawsuit with its own citizens, it could hardly be expected to submit to the decisions of courts of a state government. National courts, it was thought also, would provide more impartial tribunals than state courts for the decision of boundary disputes and other controversies between two or more states, and of controversies between the citizens of the same state claiming lands under grants of two or more states, or between citizens residing in different states.

For these various reasons, the makers of the constitution decided upon a national judiciary and put into the instrument a separate article—the third—commonly known as the judiciary article. Without going into such

✓ The judiciary article

¹ No. xxii (Lodge's ed., 132).

matters as the number, composition, and interrelations of the national courts, this article provides simply that the national judicial power "shall be vested in one supreme court and in such inferior courts as Congress may from time to time ordain and establish." With remarkable conciseness and lucidity, it indicates also the limits, or range, of this national judicial power—a matter so obviously basic as to furnish the natural starting point for any study of the system.

Scope of the Federal Judicial Power

Federal
judis-
diction:

In the domain of justice, as in all others, the national government has only delegated and enumerated powers—which means that the national courts have jurisdiction over only those classes of cases specified in the constitution, or implied in it, while the state courts have jurisdiction over all others. As a glance at the judiciary article will show, the federal judicial power extends to some cases because of the nature of the matter in controversy, and to others because of the status or residence of the parties concerned. The first of these two classes of cases includes (1) all cases in law and equity arising under the constitution, laws, and treaties of the United States, and (2) all cases of admiralty and maritime jurisdiction. That is to say, whenever, in any lawsuit, a right is asserted which is based upon some provision of the national constitution, laws, or treaties, or when it is asserted that some right secured by the national constitution, statutes, or treaties has been violated by the enactment of a state law or municipal ordinance, the case may be commenced in, and decided by, the federal courts; or, if commenced in a state court, it may, before final decision, be transferred to the federal courts. In other words, whenever it becomes essential to a correct decision of a lawsuit to obtain an interpretation or application of the national constitution, laws, or treaties, the case comes within "the judicial power of the United States." Cases of "admiralty and maritime jurisdiction," also falling in this class, have to do with offenses committed on shipboard, and with contracts which by their nature must be executed partly or wholly on the high seas or "navigable waters of the United States," *e.g.*, contracts for the transportation of passengers and freight, marine insurance policies, contracts for ships' supplies and seamen's wages, and actions to recover damage for torts and other injuries. In time of war, prize cases, too, are included.

1. On
ground
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of contro-
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2. On
ground
of status
of the
parties

The second class of cases comes within the scope of the federal judicial power because of the character or residence of the parties, and includes (1) all cases affecting ambassadors and other public ministers and consuls; (2) controversies to which the United States is a party; (3) controversies between citizens of different states; (4) disputes between citizens of the same state claiming lands under grants from different states; and (5) cases to which a state is a party. From this last class,

however, the Eleventh Amendment has excepted suits brought against a state by the citizens of another state or by those of a foreign country. Such cases, if triable at all, fall exclusively within the jurisdiction of the state courts.¹

The mere fact, however, that certain classes of cases are mentioned in the constitution as falling within the judicial power of the United States does not necessarily mean that they are thereby wholly removed from the jurisdiction of the state courts—because the constitution gives the federal courts no *exclusive* jurisdiction whatever. Congress alone determines by law which of the cases specified in the constitution shall be handled exclusively by the federal courts; all others may be tried in state courts. Under existing national statutes, the federal courts have *exclusive* jurisdiction of all civil actions in which a state is a party, except those between a state and its citizens or against a state by citizens of another state or by aliens; also of the following cases, arising under either the constitution or national statutes: crimes, penalties, and seizures, and all admiralty, maritime, patent-right, copyright, and bankruptcy cases; and, further, of all suits and proceedings against ambassadors, or other public ministers (or their servants), and against consuls or vice-consuls. Concurrent jurisdiction is enjoyed by the federal and state courts over practically all other cases falling within the judicial power of the United States,² which means that the party instituting such a case (the plaintiff) has the option of commencing his action in a court of his own or the defendant's state, or of bringing it into a federal court.

The existence at all times of thousands of cases on the dockets of the federal courts may be accounted for in one or another of three different ways. By far the greatest number are cases begun and ended in a federal court because that is the only forum in which they can be tried at all. Other cases have been commenced in a state court, but have been transferred, at the request of the defendant, to a federal court to be finally disposed of there. Such removal is permissible (1) when the parties reside in different states, and (2) when, even though they reside in the same state, some right or immunity is called in question which is based upon the national constitution, laws, or treaties. In the first instance, the case is said to have been removed by reason of the "diverse citizenship" of

Exclu-
sive or
concur-
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jurisdic-
tion?

How
cases
get
into the
federal
courts

¹ No state may be sued, even in its own courts, without its consent. In the case of *Chisholm v. Georgia* in 1793 (2 Dallas 419), the Supreme Court sustained an action brought against the state of Georgia by a citizen of South Carolina. This was generally regarded as derogatory to the dignity of a sovereign state, and it led to the immediate adoption of the Eleventh Amendment, which excepts from the jurisdiction of federal courts cases brought against a state by citizens of another state or of a foreign state. On the suability of a state, see W. W. Willoughby, *Constitutional Law of the United States* (2nd ed.), III, Chap. LXVII.

² In a few instances, Congress has left jurisdiction wholly to the state courts, e.g., in suits between citizens of different states where no federal question is involved and the amount in controversy is less than \$3,000. These cases may not be brought into the federal courts at all, either originally, by removal, or by appeal.

the parties;¹ in the second, because a "federal question" is involved. In either event, the removal must take place before the state courts have entered final judgment. Almost without exception, cases so transferred go directly to an inferior federal court, rather than to the Supreme Court; although they may ultimately reach that tribunal if an appeal is taken from the decision of the lower court. The object of permitting removals is to place the defendant on an equal footing with the plaintiff (who had a choice between the federal and state courts when he brought his suit), and especially to protect the defendant against the effects of local prejudice. Lastly, cases get into the federal courts as a result of appeals from the decision of the highest court of the state where the action started. If, in deciding such cases, the state court finds it necessary to uphold or deny any right claimed under the national constitution, laws, or treaties, the defeated party may take an appeal directly to the federal Supreme Court, which thus is given the last word in passing upon national rights.²

Kinds of Cases Tried

1. Criminal law and cases under it

The cases appearing in the federal courts in one or another of the ways just explained fall into two great divisions—criminal and civil. The only criminal jurisdiction belonging to the federal courts is such as has been conferred by act of Congress; and Congress, of course, has no authority to define crimes and fix penalties except as it is derived, directly or indirectly, from the constitution. In only five kinds of cases has that instrument directly conferred this authority, namely, (1) piracies and felonies committed on the high seas; (2) offenses against the law of nations, or international law; (3) counterfeiting the securities and current coin of the United States; (4) treason against the United States; and (5) offenses committed in the District of Columbia, in a place wholly under national control (such as a fort or an arsenal), or in the territories and dependencies, where Congress has ample authority to define crimes and determine their punishment.³

¹ The right to transfer cases from state to federal courts on account of diversity of citizenship has been extended to citizens of Alaska, Hawaii, and the District of Columbia. See J. A. McKenna, Jr., "Diversity of Citizenship Clause Extended," *Georgetown Law Jour.*, XXIX, 193-203 (Nov., 1940); D. O. McGovney, "A Supreme Court Fiction," *Harvard Law Rev.*, LVI, 853-898, 1090-1124, 1225-1260 (May, June, July, 1943).

² Before 1928, such an appeal commonly took the form of a "writ of error," directed by the Supreme Court to the state court concerned. In the year mentioned, however, Congress abolished writs of error. 42 *U. S. Stat. at Large*, 54. Appeals may now be taken from state courts only by "writ of certiorari," which the Supreme Court may, in its discretion, grant or refuse. Cf. J. C. Peacock, "Purpose of Certiorari in Supreme Court Practice," *Amer. Bar Assoc. Jour.*, XV, 681-684 (Nov., 1929).

³ The federal criminal code will be found in *Code of the Laws of the U. S.* (1934), 719-792. There are nine principal federal crime control agencies: the Bureau of Investigation, the Secret Service, the Intelligence Unit of the Bureau of Internal Revenue, the Enforcement Division of the Alcohol Tax Unit, the Customs Agency Service of the Bureau of Customs, the Bureau of Narcotics, the Coast Guard, the Immigration Border Patrol, and the Office of Chief Inspector of the Post-Office Department. See A. C. Millsbaugh, *Crime Control by the National Government* (Washington 1937).

If, however, the criminal dockets of the federal courts contained only cases falling within these five classes, the criminal jurisdiction of these tribunals would be quite unimpressive. Actually, the power of Congress to define crimes and provide for their punishment is very much greater than the above enumeration would indicate; for whenever Congress has authority under the constitution to enact a law upon a given subject, it has the implied or resulting power to make that law effective by providing that infractions thereof shall be treated and punished as crimes. The power to establish post-offices, for example, carries with it the implied power to punish the crime of robbing the mails; the power to coin money, the implied power to punish counterfeiting of paper currency. Invoking its power to regulate and protect interstate commerce, Congress, in 1934, passed a series of laws materially enlarging federal jurisdiction over acts that are originally state criminal offenses, but which often assume an interstate character because of the flight of the perpetrator.¹

Stat-
utory
crimes

Procedure in federal criminal cases² is regulated in large measure by those provisions of the early amendments designed to protect the rights of persons accused of crime by surrounding them with the safeguards against arbitrary and irregular prosecutions that were inherited from the English common law and embodied in the Bill of Rights of 1689. No civilian, for example, may be put on trial for a federal offense (except a misdemeanor) unless he has been indicted by a grand jury, nor be compelled to testify against himself in any criminal case, nor be deprived of life, liberty, or property without due process of law. Persons accused of crime are entitled to a speedy and public trial by an impartial jury;³ to a trial in the vicinity where the crime was committed,

Crim-
inal pro-
cedure

¹ With jurisdiction restricted to their respective states, state authorities formerly were often handicapped by lack of any right to cross state lines in pursuit of persons accused or suspected of crime. Federal penal legislation of the sort mentioned above has aided in bringing about a closer coordination and cooperation of state and federal criminal authorities. In 1934, Congress expressly authorized "any two or more states to enter into agreements or compacts for cooperative effort and mutual assistance in the prevention of crime and in the enforcement of their respective criminal laws and policies, and to establish such agencies, joint or otherwise, as they may deem desirable for making effective such agreements and compacts." Upwards of forty states have since signed an interstate compact for the supervision of parolees and probationers; and during 1941, more than five thousand such persons were permitted to leave the jurisdiction of their sentencing state and were being supervised by the parole and probation authorities of other states. *State Government*, XVII, 323 (Apr., 1944). Cf. L. B. Boudin, "The Place of the Anti-Racketeering Act in Our Constitutional System," *Cornell Law Quar.*, XXVIII, 261-285 (Mar., 1943).

² The only provision in the constitution's "bill of rights" relating to civil procedure is Art. VII, which guarantees trial by jury in all civil cases in which the amount in controversy exceeds twenty dollars.

³ The right to trial by jury does not extend to petty offenses, and may be waived, under certain circumstances, even in felony cases. See *Schick v. United States*, 195 U. S. 65 (1904); *Patton v. United States*, 281 U. S. 276 (1930); and especially *Adams v. United States*, 317 U. S. 269 (1942). Cf. M. E. Otis, "Selecting Federal Jurors," *Amer. Bar Assoc. Jour.*, XXIX, 19-21 (Jan., 1943); W. W. Blume, "Jury Selection Analyzed—Proposed Revision of the Federal System," *Mich. Law Rev.*, XLII, 831-862 (Apr., 1944). For the guidance of persons drawn to serve on juries in federal courts, the Judicial Conference of Senior Circuit Judges has prepared a small *Handbook for Petit Jurors* (1944), which explains in language readily understood the functions of jurymen in such courts.

in order to facilitate the obtaining of witnesses; to be furnished with an exact copy of the indictment; to have witnesses subjected to cross-examination in their presence; to have compulsory process for obtaining witnesses; to have the assistance of counsel for their defense; and to be admitted to bail in a reasonable sum, pending trial. Furthermore, no person may again be subjected to trial in a federal court for the same offense if he has once been acquitted on the charge. But the same offense may be punishable by the state authorities in the state courts and by the federal authorities in the federal courts. This is true, for example, in cases of fraud where use has been made of the mails, and of theft from freight-cars moving in interstate commerce. And the fact that a person has been successfully prosecuted for such an offense in a state court is no bar to prosecuting and convicting him in a federal court; for in such cases the defendant is merely being tried in different jurisdictions for offenses against different sovereignties. Instances of this sort of thing were particularly numerous during the days of national prohibition.¹

Criminal prosecutions are instituted and trials conducted, on behalf of the government, by district attorneys appointed by the president on recommendation of the attorney-general, for each of the eighty-four districts into which the states are now divided; and the territories have their district attorneys serving in a similar capacity. In exceptionally important and complicated cases, a special district attorney may be appointed to represent the government.

2. Civil cases:

Civil cases constitute the second great division of actions tried in the federal courts. On the basis of the law administered, three distinct sorts of civil cases must be distinguished—cases at law, cases in equity, and admiralty cases. Cases at law comprise mainly actions arising out of civil wrongs, called torts, and actions based upon contracts, either express or implied. They rest upon some principle of the old common law carried over from England, or upon some state or federal statute; and they are tried in accordance with the rules of the common law, or modifications thereof provided for by state² or federal statutes. In most actions at law, the redress sought is money damages, and the remedy is granted only after the wrong has been committed or the contract has been broken. At common law, such actions could be brought into the courts only when they could be fitted into some one of about a half-dozen stereotyped and rigid forms of action, such as *assumpsit*, *trover*, *trespass*, *replevin*, etc. But cases were constantly arising, as they do nowadays, in

(a) Cases at law

¹ The punishment of the same offense by both the federal and state governments is sometimes mistakenly spoken of as violating the "double jeopardy" provision of the Fifth Amendment. What that provision actually bars is only a second prosecution in the same jurisdiction.

² In the decision of many cases based upon diverse citizenship of the parties, the courts are called upon to interpret or apply no provisions of national law, but merely those of state laws. For example, if a suit is brought between citizens of New York and of Pennsylvania regarding land in Pennsylvania, the only law involved in the case and applied by the federal court is the local law of Pennsylvania.

which substantial justice, or equity, could not be obtained under any of these common-law actions, or even by the award of money damages. There are many cases, for example, in which the granting of money damages to the injured party is an inadequate remedy, for the very good reason that the defendant may refuse to pay the judgment obtained against him and has no property which can be seized and sold to satisfy the judgment. Or it may be impossible to estimate the amount of damages that would result from non-fulfillment of an agreement. In still other cases, a contract may be involved—for example, a deed conveying title to real estate—which is perfectly regular and legal on its face and is executed with due formality, although the circumstances surrounding its execution have been tainted by fraud, intimidation, or undue influence.

In order to do "equity," or "substantial justice," in such cases as these, the "equity jurisdiction" of English and American courts has been built up through the centuries as a supplement to the usual law remedies. How equity proceedings attain their object may be illustrated by following out each of the illustrations employed above. Industrial strikes often result in injury or destruction of property for which no adequate money damages can be collected. In equity proceedings, a federal court may, by issuing a writ of injunction,¹ command the strikers and their sympathizers to refrain from injuring or destroying property belonging to an employer. Any violation of the terms of an injunction constitutes an offense known as contempt of court, which may be punished severely and summarily by the court whose injunction has been disregarded, in most cases without benefit of jury trial for the offending parties.² In this fact, and in the additional aspect that injunctions may be issued in advance of any actual injury or destruction, as a means of *preventive* justice, lies the superiority of equity proceedings in such cases over the only alternative at common law, namely, an action for damages after property has been injured or destroyed.

(b)
Cases
in equity

Again, when it is impossible to estimate the amount of damages that might result from a breach of contract, as when the owner of a valuable race-horse has agreed to sell that horse—the only one the purchaser wants—a court, in equity proceedings, will, by a decree of "specific performance," order the owner to carry out the agreement. Failure to do so thereafter will subject the owner to contempt proceedings. In the third

¹ An injunction is a writ issued by a court commanding an individual, a group of persons, or a corporation to do, or to refrain from doing, certain acts described in the writ. The writ is of very early English origin, and the right to issue it is not peculiar to the federal courts, but belongs to the state courts as well. At one time, injunctions were employed so frequently in labor disputes that labor leaders loudly denounced "government by injunction."

² The Clayton Anti-Trust Act of 1914 provided for trial by jury in cases of *indirect* contempt arising out of labor disputes, that is, for acts done outside the presence of the court and not interfering with the performance of judicial functions. The Norris-La Guardia Act passed in March, 1932, regulates the jurisdiction of federal courts in matters affecting employer and employee, and includes a series of specific restrictions upon the courts in granting injunctions in labor cases. See *Code of the Laws of the U. S.* (1934), 1325-1328.

type of cases, a court in equity proceedings may entirely set aside a deed for the transfer of property on the ground of fraudulent or other improper circumstances surrounding execution of the deed.

No separate equity courts

The rules and remedies peculiar to equity practice and procedure are enforced by the same federal judges who administer the principles and rules of the common law; and it is always necessary in equity proceedings, before a judge will grant the appropriate equity relief, to establish the fact that the party seeking equity has no adequate remedy at law. In its long history in England and in this country, equity has come to have its own elaborate and highly technical code of rules and precedents parallel to the complicated rules and procedure in common-law actions. Such equity rules as are observed and enforced in our federal courts are drawn up, and at extended intervals revised, by the justices of the Supreme Court.

(c) Admiralty cases

Lastly, the same federal judges that administer common law and equity also administer admiralty and maritime law in cases of tort and contract connected with shipping and water-borne commerce on the high seas or "navigable waters of the United States." Such cases are tried and determined in accordance with the highly technical and peculiar rules of an admiralty code inherited from England and modified by acts of Congress. In prize and piracy cases, the judges sitting in admiralty courts also administer international law.

The courts as business managers

In their handling of cases at law and in equity, the federal courts in recent decades have increasingly become the managers of important businesses, through their right to appoint receivers to take charge of and manage property, pending litigation, for the benefit of the owners, stockholders, or creditors. As a result, the courts have found themselves indirectly engaged in the operation of railways, municipal transportation systems, mines, factories, and various other business enterprises; and in so doing they are required to pass upon questions of business administration, service, and personnel, supervise accounts, authorize bond issues and sales of property, and intervene in controversies between employers and labor unions over wages and working conditions. In this capacity, "they are as truly the business managers of the properties or enterprises which they are judicially guarding as if the judges bore the title of president or superintendent."¹

Structure of the Federal Judicial System

Having viewed the scope of the national judicial power, the different ways in which cases get into the federal courts, and the kinds of cases that federal judges are called upon to handle, we are in a position to take up the structure, or organization, of the courts composing the federal judicial system. Only one such court, the Supreme Court, is definitely provided for in the constitution; all of the others have been created, and

¹ W. MacDonald, *A New Constitution for a New America*, 192.

their jurisdictions have been determined, by acts of Congress passed at various times, beginning with the Judiciary Act of 1789, which forms the basis of the present organization.

First, in logical order, come the courts of first instance, called district courts, of which there are, in the states, eighty-four.¹ A small state, such as Vermont or New Hampshire, may constitute a district by itself; larger or more populous states may be divided into two or more districts; and in still other cases, a district may consist of parts of two or more states. In every district there is at least one district judge, and there may be as many as thirteen if the amount of litigation warrants. All are appointed by the president and Senate on recommendation of the attorney-general, and hold office during good behavior.² Where there is more than one judge, the district court holds its sessions in different "divisions" simultaneously, each with a single judge sitting.³ In all, there are approximately 180 district judges.⁴

1. District courts

All federal crimes are prosecuted in these tribunals, and likewise proceedings under the anti-trust laws, admiralty cases, suits arising under the internal revenue, postal, copyright, patent, and bankruptcy laws, or under any law regulating commerce, as well as cases removed from a state court before final judgment.⁴ In a few instances, appeals may be taken directly to the Supreme Court; but as a rule they go first to a circuit court of appeals. The district court itself has no appellate jurisdiction whatsoever; the common impression that cases may be appealed from a highest state court to a federal district court is quite erroneous.

Their jurisdiction

¹ There are also district courts—one in each case—in the District of Columbia, Alaska, Hawaii, Puerto Rico, the Virgin Islands, and the Canal Zone.

² In February, 1939, the Senate refused to confirm the nomination of Floyd H. Roberts to be district judge in western Virginia, because his nomination was "utterly and personally obnoxious" to both senators from Virginia. This rejection of a person whose qualifications were conceded revived discussion of the defects of the present system of naming federal judges, and of possible substitute methods. See W. D. Mitchell, "Appointment of Federal Judges," *Amer. Bar Assoc. Jour.*, XVII, 569-574 (Sept., 1931); B. Shartel, "Federal Judges—Appointment, Supervision, Removal," *Jour. of Amer. Judic. Soc.*, XV, 21-30, 46-51, 79-88 (June-Oct., 1931).

³ Ordinarily, as indicated, cases in the district courts are heard and decided by a single judge. However, a court consisting of three judges is required to pass upon applications for injunctions to restrain state officers from enforcing a state law alleged to be unconstitutional. *Code of the Laws of the U. S.* (1934), 1274-1275. Likewise, under an act of 1937, a court of three judges is required to pass upon applications for injunctions to prevent the enforcement of federal laws alleged to be unconstitutional. 50 *U. S. Stat. at Large*, 751.

⁴ During the first half-century under the constitution, the state courts had concurrent jurisdiction over federal crimes. C. Warren, "Federal Criminal Law and the State Courts," *Harvard Law Rev.*, XXXVIII, 545-598 (Mar., 1925); W. Denman, "Critical Study of the United States Trial Courts," *Jour. of Amer. Judic. Soc.*, XXI, 115-125 (Dec., 1937).

On June 30, 1934—in a period of economic depression—bankruptcy cases (63,352) outnumbered all others, civil or criminal, on the federal dockets. For a number of years thereafter, the number stood at over 50,000. By 1943, however, it had dropped nearly one-third, to 34,711. In the three fiscal years 1942-44, the most numerous types of civil cases related to property condemnation and to price control and rationing regulations; in 1944, the former numbered 2,748 (a decline from 4,975 in 1943), and the latter, 6,707 (an increase from 2,230 in 1943). *Annual Report of the Director of the Administrative Office of United States Courts* (1944), 1.

2. Circuit courts of appeals

Next in order come the circuit courts of appeals, one of which is found in each of the ten great judicial circuits into which the country has been divided, with an additional one in the District of Columbia. District judges may be called in to serve in these courts; but usually a court of appeals is composed of circuit judges, appointed by the president and Senate, and holding office during good behavior.¹ In circuits having the largest amount of litigation or greatest area, there are as many as six or seven circuit judges.² In every circuit, there must be at least three; and in contrast with the district courts, in which judges sit singly, at least two circuit judges must hear every case, with certification of a case to the Supreme Court for instructions or for final decision if the circuit judges divide equally upon it. The original purpose in creating the circuit courts of appeals was, however, to relieve the Supreme Court of some of its appellate jurisdiction, and thus to expedite the final decision of rapidly multiplying cases.³ The work of the courts of appeals is confined entirely to cases appealed from the district courts and to the review and enforcement of orders issued by certain administrative bodies, such as the Interstate Commerce Commission, the Federal Trade Commission, and the National Labor Relations Board. Since in most cases their decisions are final, they are really courts of last resort in suits between aliens and citizens, between citizens of different states where no federal question is involved, and in cases arising under the criminal, patent, copyright, bankruptcy, and revenue laws, or the law of admiralty (except prize cases), when the amount in controversy does not exceed one thousand dollars.⁴ Nevertheless, in any of these instances the Supreme Court may, upon petition of either party, and before final action, order a case transferred to itself for review and final decision.

3. The Supreme Court

At the head of the federal judicial system—in a sense, at the head of the entire judicial system of the United States—stands our most august tribunal, the Supreme Court, first organized under the Judiciary Act of 1789 with a chief justice and five associate justices.⁵ Since then the total number of justices, as fixed by Congress, has once been as high as ten, although at present—notwithstanding a presidential project in 1937 for increasing it—it is nine.⁶ Appointed, of course, by the president and Senate, all hold office during good behavior; and, as with judges in the lower federal courts, salaries are fixed from time to time by Con-

¹ There are at present fifty-eight such judges. The circuits and the areas included within them are listed in *U. S. Government Manual* (Summer, 1944), 48-49.

² M. T. Manton, "Organization and Work of the United States Circuit Courts of Appeals," *Amer. Bar Assoc. Jour.*, XII, 41-46 (Jan., 1926). The jurisdiction of the circuit courts of appeals was considerably enlarged by act of Congress in 1925. Charts showing the appellate relationship of the federal courts will be found in *U. S. Daily*, Sept. 29, 1926, and Oct. 24, 1930.

³ C. Warren, "The First Decade of the Supreme Court of the United States," *Univ. of Chicago Law Rev.*, VII, 631-654 (June, 1940).

⁴ The number—originally six—was reduced to five in 1801, increased to seven in 1807, to nine in 1837, to ten in 1863, reduced to seven in 1866, and again increased to nine in 1869.

gress, subject to the single constitutional restriction that no judge's compensation may be diminished while he continues in office. The chief justice now receives \$20,500 a year, and the associate justices \$20,000 each.

Although paid a little more, the chief justice, has, in reality, no more legal weight or influence in deciding cases than any of the associate justices. He is simply the presiding judge at sessions of the Court, acting further as a sort of chairman in assigning to his associates the task of writing the Court's decisions in cases that have been heard and discussed.¹ His position in this respect does not, however, exempt him from performing his share of this kind of work. He also appoints members of the Court to serve on committees which now and then revise the rules governing equity procedure and the rules of practice in actions at law, and which also have drafted rules of criminal procedure.² In all, twelve chief justices have presided over our highest judicial tribunal since its creation.³ The outstanding figure in the list is John Marshall, whose tenure covered more than thirty years (1801-34), and who, because of his forceful and winsome personality, his firm and clear convictions in favor of a liberal construction of the powers of the national government, and the masterful logic and lucidity of style with which those convictions were expressed in many a notable decision during the formative period of our national institutions, is justly regarded as "the second father of the constitution"—even though some of the constitutional interpretations for which he is famous are not in favor with the Court as it stands today.⁴ There have been associate justices also whose personality and influence upon our constitutional history entitle them to mention—notably James Wilson (1789-98), Joseph Story (1811-45), Stephen J. Field (1863-97), John M. Harlan (1879-1911), and Oliver Wendell Holmes (1902-32).

Each member of the Supreme Court is assigned to one (in two instances to two) of the judicial circuits into which, as we have seen, the country has been divided; and all are entitled to sit with the courts of appeals of their respective circuits. No one of them, however, ever finds time actually to "go on circuit," as was the practice in early days. Sessions

¹ Five statutes enacted between 1940 and 1943 gave the Court rule-making power in criminal cases, and pursuant to this legislation the Court instituted the preparation of a code of rules of criminal procedure, with the assistance of an advisory committee of lawyers and judges. The work of the committee and the rules proposed are discussed in *Jour. Amer. Judic. Soc.*, XXVII, 38-48 (Aug., 1943); *ibid.*, 101-104 (Dec., 1943); *Amer. Bar. Assoc. Jour.*, XXIX, 376-378 (July, 1943); and *Mich. Law Rev.*, XLII, 353-382 (Dec., 1943).

² In chronological order, they are: John Jay, 1789-95 (resigned); John Rutledge, 1795-96; Oliver Ellsworth, 1796-1800 (resigned); John Marshall, 1801-35; Roger B. Taney, 1836-64; Salmon P. Chase, 1864-73; Morrison R. Waite, 1874-88; Melville W. Fuller, 1889-1910; Edward D. White, 1910-21; William H. Taft, 1921-30; Charles E. Hughes, 1930-41; and Harlan F. Stone, since 1941.

³ On the influence of Marshall, see series of addresses delivered at the centennial celebration of his appointment, *John Marshall; Life, Character, and Judicial Services*, 3 vols. (Chicago, 1903); W. E. Dodd, "Chief Justice Marshall and Virginia," *Amer. Hist. Rev.*, XII, 776-787 (July, 1907); E. S. Corwin, *John Marshall and the Constitution* (New Haven, 1919); and A. J. Beveridge, *Life of John Marshall*, 4 vols. (Boston, 1916-19). There is also a two-volume edition of the last-mentioned work (1929).

of the Court are held annually, in the new and impressive Supreme Court building,¹ beginning in October and lasting until about May.

Decisions
and
"opin-
ions"

Six justices must be on hand when any case is argued, and not less than a majority of that "quorum," *i.e.*, four, must be in agreement upon any decision handed down.² If fewer than this minimum can concur, a rehearing is likely to be ordered; although an even division commonly means simply that the decision of the lower court will stand without further contest.³ Supporting every decision is a more or less extended "opinion," or statement indicating the line of reasoning pursued; and any justices who concur in the result, but have arrived at it by a differing line of argument, are permitted to contribute single or joint "concurring" opinions, while any one or more unable to concur may submit single or joint "dissenting" opinions.⁴ And all decisions and opinions are regularly published by the government, for the benefit of the legal profession and the general public, in a series of volumes known as *United States Reports* ⁵

¹ For more than seventy years prior to 1935, the sessions of the Court were held in the old Senate chamber in the Capitol. See T. E. Waggaman, "The Supreme Court; Its Homes, Past and Present," *Amer. Bar Assoc. Jour.*, XXVII, 283-289 (May, 1941).

² The requirement of a quorum of six justices has recently prevented the Court from hearing several important cases, inasmuch as four of the nine justices have regarded themselves as disqualified to sit in those cases because (in three instances) of former connection with the Department of Justice. Bills have, therefore, been introduced in Congress (1944) to make a simple majority (now five) a quorum, as was the rule from 1789 to 1863. The rule of six originated when (1863-69) the Court had ten members and seems to have been retained by inadvertence when the number was reduced to nine. See C. Warren, "Quorum of Court," *N. Y. Times*, Dec. 20, 1942; I. M. Wolff, "Congressional Consideration of the Supreme Court Quorum," *Georgetown Law Jour.*, XXXII, 293-297 (Mar., 1944); H. E. Cunningham, "The Problem of the Supreme Court Quorum," *Geo. Washington Law Rev.*, XII, 175-189 (Feb., 1944); Hearings before sub-committee of the House Judiciary Committee on H. R. 2808, to change the quorum of the Supreme Court (June 11 and 24, 1943).

³ A notable instance of this occurred in 1895, when the income tax law of 1894 was held unconstitutional (*Pollock v. Farmers' Loan and Trust Co.*). In 1917, the constitutionality of an Oregon minimum wage law, and in 1936 the constitutionality of a New York unemployment insurance law, was sustained by reason of an even division in the Supreme Court.

⁴ See E. A. Evans, "The Dissenting Opinion; Its Use and Abuse," *Missouri Law Rev.*, III, 120-142 (Apr., 1938); C. H. Pritchett, "Division of Opinion Among Justices of the United States Supreme Court, 1939-41," *Amer. Polit. Sci. Rev.*, XXXV, 890-898 (Oct., 1941); *ibid.*, "The Voting Behavior of the Supreme Court, 1941-42," *Jour. of Politics*, IV, 491-506 (Nov., 1942); *ibid.*, "Ten Years of Supreme Court Voting," *Southwestern Soc. Sci. Quar.*, XXIV, 12-22 (June, 1943); *ibid.*, "The Coming of the New Dissent; The Supreme Court, 1941-43," *Univ. of Chicago Law Rev.*, XI, 49-61 (Dec., 1943); and *ibid.*, "Dissent on the Supreme Court, 1943-44," *Amer. Polit. Sci. Rev.*, XXXIX, 42-54 (Feb., 1945). In the last-mentioned article, Professor Pritchett comments on the increasing proportion of "dissents" in later years—rising from usually ten to twenty per cent of the cases decided in earlier days to a clear majority of them in 1943-44. This recent record of vacillation and disagreement, in a Court supposed to have been rendered more homogeneous and harmonious by the "liberalizing" appointments of 1938-41 (see p. 476 below), has disturbed a good many people, who, in trying to find reasons for it, are likely to include among them the rather astonishing fact that of the present (1945) nine members of the Court, seven were, when appointed, totally devoid of judicial experience, and one other had served only as a police judge.

⁵ Reports of Supreme Court decisions before 1882 are usually cited by the name of the reporter who prepared them for publication, as follows: Dallas, 4 vols., 1790-1800; Cranch, 9 vols., 1801-15; Wheaton, 12 vols., 1816-27; Peters, 16 vols., 1828-42; Howard, 24 vols., 1843-60; Black, 2 vols., 1861-62; Wallace, 23 vols., 1863-74; and

and prepared under the editorial supervision of a reporter of decisions appointed by the Court. Early in its history, the Court declined to offer opinions on general questions or hypothetical cases submitted to it by either Congress or the president; and, ever since—unlike the highest tribunals in a number of states where “advisory opinions” are rendered—only *decisions* have been handed down, and in pursuance of bona fide cases.¹

Cases come before the Supreme Court in one of two ways. A few may be commenced there, and over these the Court is said to have “original” jurisdiction. The constitution itself specifies that the Supreme Court shall have original (although not necessarily exclusive) jurisdiction in “all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party.” In view of this provision, Congress may not enlarge the original jurisdiction of the Court—as it attempted to do in the Judiciary Act of 1789—for that would be tantamount to amending the constitution in an unauthorized manner.² The great majority of cases, on the other hand, come to the Court on appeal either from a lower federal court or from a highest state court when some federal question is involved.³

Until 1922, the district courts, and likewise the circuit courts of appeals, were virtually independent units, without a supervising or unifying head. When work grew excessive in one district or circuit, the usual remedy was for Congress to create a new judgeship or two, although there might be a dozen judges in other districts or circuits with com-

Jurisdiction

The Federal Judicial Conference

Otto, 17 vols., 1875-82. Since 1882, the *Reports* have been designated by serial number only, beginning with Volume 107, and are cited as 107 U. S., etc.

The Court Reporter Act of 1944 (58 U. S. Stat. at Large, 5) henceforth insures a verbatim record of all federal court proceedings, unless specifically dispensed with. *Annual Report of the Director of the Administrative Office of United States Courts* (1944), 7-9.

¹ The supreme court in eleven states has authority to hand down advisory opinions. Objections to the practice are set forth in *Constitutional Rev.*, VIII, 231-237 (Oct., 1924). Cf. E. F. Albertsworth, “Advisory Functions in the Federal Supreme Court,” *Georgetown Law Rev.*, XXIII, 643-670 (May, 1935); F. R. Aumann, “The Supreme Court and the Advisory Opinion,” *Ohio State Univ. Law Jour.*, IV, 21-55 (Dec., 1937).

² In 1789, Congress conferred original jurisdiction on the Supreme Court in mandamus cases, and for that reason a part of the Judiciary Act of 1789 was held void by the Supreme Court in the famous case of *Marbury v. Madison*, 1 Cranch 137 (1803). A mandamus is a writ issued by a court commanding a public officer, a corporation, or an inferior court to perform a specified duty imposed by some law. It must also be a ministerial duty, not one involving the exercise of any discretion by the party to whom the writ is directed. The right to issue this writ, and a number of other important writs, belongs to both federal and state courts.

³ A leading case on the appellate jurisdiction of the Supreme Court is *Martin v. Hunter's Lessee*, 1 Wheaton 304 (1816). Pending complete independence of the Islands (presumably to be attained after their liberation from Japanese control), appeals from the supreme court of the Philippines may also be taken to the United States Supreme Court. Appeals from the district court of Alaska and the supreme court of Hawaii and of Puerto Rico, which formerly went to the Supreme Court, now go to a circuit court of appeals. Important changes in the appellate jurisdiction of the Supreme Court, made by act of Congress in 1925, are explained in G. Hankin, “The United States Supreme Court Under the New Act,” *Jour. of Amer. Judic. Soc.*, XII, 40-43 (Aug., 1928). Cf. *ibid.*, XIII, 92-94 (Oct., 1929).

paratively little to do. In the year mentioned, however, Congress passed an important act opening the way for the long-needed unification and equalization of court work.¹ The chief justice of the United States now became, in some degree, a supervising and directing head of the entire federal judicial system, and provision was made for a federal judicial conference or council, convoked annually and presided over by the chief justice, and composed of all the senior circuit judges of the ten circuits. To this conference it fell (1) to make comprehensive surveys of business in the federal courts; (2) to prepare plans for assignment and transfer of judges to or from circuits and districts as circumstances might make desirable; and (3) to submit suggestions to the various courts "in the interest of uniformity and expedition of business." For a decade or more, these and other newer arrangements imparted a degree of unity and flexibility in handling court business which had been conspicuously lacking.²

Adminis-
trative
Office of
United
States
Courts

Later on, however, the system seemed to stand in need of further renovation; and in his famous message of February 5, 1937, relating to judicial reorganization,³ President Franklin D. Roosevelt recommended that the Supreme Court be authorized to appoint a proctor to assist the Court in supervising the conduct of business in the lower courts. No action resulted at once. But in 1939 Congress set up the Administrative Office of United States Courts, with a director at its head, appointed by the Supreme Court and holding office during the pleasure of that body.⁴ One division of the new agency—that of business administration—provides the courts with their material needs;⁵ a second—that of procedural studies and statistics—furnishes the Supreme Court with information concerning the state of judicial business and makes recommendations looking to increased efficiency and speed.⁶

Other
confer-
ences
and
councils

The annual conference of senior circuit court judges continues to function, and to it the director of the Administrative Office is required to submit annual reports on the state of business in, and the material needs of, all the courts. In addition to attending this conference, the senior circuit judge in each circuit holds, at least twice each year, a council composed of all the circuit judges for the circuit; and this council considers plans for the effective and expeditious transaction of business in the district courts—plans which it becomes the duty of every district

¹ *Code of the Laws of the U. S.* (1934), 1258.

² The yearly reports of the Judicial Conference may be found in the attorney-general's annual reports.

³ See p. 472 below.

⁴ 53 *U. S. Stat. at Large*, 1223-1226; summary in *Georgetown Law Jour.*, XXVIII, 383-391 (Dec., 1939).

⁵ Such as quarters, supplies, and clerical and other services, including preparation of the budget for the federal courts—matters that had previously been attended to by the Department of Justice. J. Miller, "Supporting Personnel of Federal Courts," *Amer. Bar Assoc. Jour.*, XXIX, 130-134 (Mar., 1943).

⁶ H. P. Chandler, "The Place of the Administrative Office in the Federal Court System," *Cornell Law Quar.*, XXVII, 364-373 (Apr., 1942); J. J. Parker, "The Integration of the Federal Judiciary," *Harvard Law Rev.*, LVI, 563-575 (Jan., 1943).

judge to carry out. In addition, a conference of both circuit and district judges is held annually, to review the state of business in the courts and to discuss means of improving the administration of justice; and since practicing lawyers, as well as judges, are vitally concerned with such matters, the law wisely permits the appointment of a limited number of members of the bar to sit with the judicial members of this conference.¹

Judicial Review

By far the most important and distinctive function of the Supreme Court is performed when that tribunal passes upon the constitutionality of state laws and acts of Congress; for in so doing, it serves as the guardian of the constitution, the upholder of the supremacy of national laws, and the defender of the reserved rights of the states. This is not difficult to understand if we distinguish two large classes of cases coming before the Court for final decision: (1) cases in which it is asserted that a state statute or a provision in a state constitution is in conflict with some clause in the national constitution, or with an act of Congress, or with a treaty; and (2) cases in which some right or authority or immunity claimed to be derived from the national constitution, statutes, or treaties is in dispute.

As an illustration of what occurs in the first class of cases, let us suppose that A, relying upon the validity of a statute passed by his state legislature, brings suit against B in the appropriate state or federal court; and that, in the course of the litigation, B denies in legal form that A has the right claimed under the state law, on the ground that this law is inconsistent with the national constitution, or with a law or treaty of the United States, and for that reason is no "law" at all, since the constitution, laws, and treaties of the United States are affirmed to be "the supreme law of the land." B, therefore, prays the Supreme Court to declare of no legal effect the state law upon which A relies to win his suit. If a majority of the justices are convinced that the inconsistency asserted by B actually exists, the Court will refuse to enforce the rights claimed by A. The state statute thus held to be "unconstitutional" may remain on the statute-book for years, until the legislature sees fit to repeal it; but every one knows that if a similar case were to arise, the Court would, in all probability, reach the same conclusion; and so, for all practical purposes, the "statute" becomes a dead letter. The common canon that the Supreme Court vetoes or annuls laws is, of course, entirely different. What it does is, rather, to pronounce unconstitutional, and therefore unenforceable, measures which in its eyes have never been valid at all, even though they may have been in actual operation for months or years;² and the same action may be taken in the case of

Review of state legislation and constitutional provisions

¹ F. W. Morse, "Federal Judicial Conferences and Councils; Their Creation and Reports," *Cornell Law Quar.*, XXVII, 347-363 (Apr., 1942).
² O. P. Field, *The Effect of an Unconstitutional Statute* (Minneapolis, 1935).

provisions of state constitutions challenged as being incompatible with the "supreme law." In thus functioning, the Court obviously becomes the ultimate medium through which the constitutional limitations upon the states outlined in an earlier chapter are declared and enforced.¹

Cases involving the validity of state constitutional provisions are comparatively rare. Those arising out of state legislation, however, are numerous. Some state statutes are alleged to infringe the right of Congress to regulate interstate commerce; others are said to impair the obligation of contracts; a very much larger number are challenged because they are thought to be in conflict with clauses in the Fourteenth Amendment forbidding the states to deprive any person of life, liberty, or property without "due process of law," or to deny to any person "the equal protection of the laws." The statutes most frequently brought into controversy under these last-mentioned clauses are such as are aimed at restricting the rights of liberty and property in order to promote and protect the public health, morals, safety, and general welfare—in other words, legislation enacted under the "police power." Such legislation is almost certain to be upheld if the Supreme Court is satisfied that the regulations in question do not amount to an "unreasonable" interference with the rights of liberty or property, and that they bear some direct relation to the protection of public health, morals, or safety, or to promotion of the general welfare. The number of state statutes invalidated is, however, large.

Review
of na-
tional
laws and
treaties

Turning to the second class of cases, *i.e.*, those in which one party asserts, and the other denies, some right or immunity derived directly from the national constitution, statutes, or treaties, we find the Supreme Court acting both as the guardian of the reserved rights of the states and as the medium through which the legislative and executive branches of the national government are restrained from overstepping the boundaries marked out for them in the fundamental law; and this function has resulted from the Court's performance of its ordinary judicial duties quite as naturally and logically as has its power to declare state laws unconstitutional.

By way of illustration, let us recall that in 1916 Congress enacted a law prohibiting the transportation in interstate commerce of goods in the manufacture of which children under the age of sixteen had been employed. Let us suppose that A was prosecuted by the Department of Justice for violating this law, and that he admitted the facts as charge. In his defense, however, he asserted that the penalty specified in the law should not be enforced against him, for the reason that the act of Congress on which the prosecution was based was not a regulation of commerce, such as Congress is authorized to enact, but rather an attempt to regulate manufacturing within his state, a subject over which, according to previous decisions of the Court, Congress had been granted no

¹ See Chap. v. above.

authority, and which, therefore, was left to be regulated exclusively by the states. Here, clearly, would be a dispute over the boundaries of national and state authority, calling for interpretation of the commerce clause of the constitution, and requiring decision by the Court before it could determine whether to order enforcement of the penalty prescribed in the law.

How does the Supreme Court meet such a question? Starting with the premise that the national government is a government of limited powers, which are enumerated in the constitution, that this constitution is the fundamental law to which all other laws and official acts of the government must conform, and that the lawmaking branch of the government may legally exercise no power for which warrant cannot be found in the constitution, the Court addresses itself to the task of examining the constitution to see whether authority to pass this child labor law has been conferred, directly or by implication. If it becomes convinced that the power to regulate commerce does not embrace the power to regulate manufacturing, the Court will refuse to enforce the penalty against A as demanded by the Department of Justice, and the statute itself will be pronounced "unconstitutional." If it comes out with an opposite conclusion, the penalty will be enforced.¹

How a measure is "declared unconstitutional"

If, in another case, the validity of a national treaty provision is challenged, a similar line of inquiry is followed in order to ascertain whether the treaty-making organs of the government have exceeded their authority. In the same manner, too, the Court may be called upon to decide whether an act of Congress encroaches upon the sphere marked out by the constitution for either the judiciary or the executive; and if it is found to do so, the Court will be obliged to decline to enforce the law. Thus are the different branches of the government kept within the bounds set for them by the constitution—at least as that instrument is interpreted by the Supreme Court. Once that tribunal has defined the scope and meaning of clauses in the constitution involved in cases coming before it, its majority decisions remain the final authoritative statement of law upon the matters covered—at least until, as sometimes happens, its decisions are reversed or modified by the Court itself.²

(Notwithstanding the criticisms that have been directed against the practice of judicial review of legislation,) it seems eminently fitting that

¹ In point of fact, the child labor measure referred to was held unconstitutional in *Hammer v. Dagenhart*, 247 U. S. 251 (1918)—a decision, however, later overruled by a differently constituted Court in *United States v. Darby*, 312 U. S. 100 (1941). See p. 48 above.

² About forty instances of such reversals or drastic modifications were listed by Mr. Justice Brandeis in *Burnet v. Coronado Oil & Gas Co.*, 285 U. S. 393 (1932); and within the brief period 1937-43 there were twenty. On the question of whether Congress may pass a law contrary to a decision of the Supreme Court, see H. M. Bowman, "Congress and the Supreme Court," *Polit. Sci. Quar.*, XXV, 20-34 (Mar., 1910). The Court's prevailing liberality of interpretation from the days of Chief Justice Marshall onwards has, of course, been responsible for the "judicial expansion" of the constitution described on pp. 54-55 above.

The
Supreme
Court
the
safest
arbitrator

the final determination of the constitutional powers of both the executive and legislative branches of our national government should rest with the judiciary rather than with either the executive or Congress. Upon the action of each of the latter branches, the constitution has placed numerous restrictions in the interest of the rights and liberties of the individual. If these authorities were permitted to fix the measure of their own powers under the constitution, especially in times of public stress, such restraints would be rendered inoperative in the very emergency situations (*e.g.*, in time of war) which they were largely designed to meet. Furthermore, the judiciary is in some respects the weakest of the three branches of the national government. It controls neither the purse nor the sword. Acting alone, it is unable directly to attack either of the other branches, or to do mortal injury to political or civil liberty. Its members are less likely to be influenced by momentary passion than are the members of Congress—perhaps than the president also. Undoubtedly it is safe to conclude that, with the judiciary possessed of its negative, yet effective, control over Congress and the executive, the limitations of the constitution have been more scrupulously observed and strictly enforced than would otherwise have been the case.

The
judicial
veto
used
sparingly

At the same time, it should be pointed out that the federal judiciary has, on the whole, been moderate in utilizing its power to overthrow acts of Congress, and even (though in this case somewhat less so) acts of state legislatures. Only a very small percentage of all the measures passed by Congress and the legislatures since 1789 have been nullified on the ground of unconstitutionality—in the case of Congress, a total of fewer than seventy acts.¹ The fact is to be recalled, too, that the Supreme Court never passes upon the constitutionality of an act of either Congress or a state legislature unless it becomes necessary to do so in determining the rights of the parties to cases coming before the courts in the ordinary course of litigation.

The
Supreme
Court
and
political
controversies

Naturally, in exercising its power to interpret words and phrases that have come down from the eighteenth century, the members of the Court, like other men, are influenced more or less by their individual political, social, and economic predilections.² In other words, the Court's inter-

¹ An analysis and tabulation of such cases, prior to 1932, will be found in C. G. Haines, *The American Doctrine of Judicial Supremacy* (2nd ed., 1932), Appendix I. A more up-to-date list appears in *Cong. Digest*, XVI, 75 (Mar., 1937). Of course, it is only fair to concede that a goodly proportion of the measures stricken down were of first-rate importance.

² C. G. Haines, "Political Theories of the Supreme Court from 1789-1885," *Amer. Polit. Sci. Rev.*, II, 221-244 (Feb., 1908); C. A. M. Ewing, "Geography and the Supreme Court," *Southwestern Polit. and Soc. Sci. Quar.*, XI, 26-46 (June, 1930); R. E. Cushman, "What's Happening to Our Constitution," *Pub. Affairs Pamphlet No. 70* (New York, 1942). When selecting persons for appointment to the Supreme Bench, the president, in his turn, may deliberately give a slant to the Court's probable decisions by choosing appointees of particular background, past connections, and political and economic views. See p. 473 below. Cf. J. P. Frank, "The Appointment of Supreme Court Justices; Prestige, Principles, and Politics," *1941 Wis. Law Rev.*, 172-210, 343-379 (Mar., May, 1941).

pretations of such broad and undefined terms as "regulate," "commerce," and "due process of law" reflect the personal attitudes and opinions of the justices, and—as will appear in later discussion of such topics as commerce and business—may and do change with changes in the Court's personnel. Realization of this led former Chief Justice Hughes, many years ago, to remark: "We are under a constitution, but the constitution is what the judges say it is." In making its interpretations, the Court is acting not merely as a judicial body settling lawsuits; it is also deciding questions of public policy—even though authority of this nature supposedly belongs exclusively to the political branches of the government, *i.e.*, Congress and the executive. In ruling that a given congressional act transcends the limits of power on which the measure purports to have been based, it in effect vetoes the act, in so doing becoming to all intents and purposes a third house of Congress. When, therefore, such interpretations have denied to the national government authority to deal with grave and pressing national problems, the Court has seemed to many to be exalting its own views of sound public policy above those of the proper policy-determining organs of the government, and thus to be exercising an absolute veto upon, or a "negative dictatorship" over, acts of the popularly elected branches. Similarly, when the Court has voided state laws dealing with social and economic problems, as not conforming to "due process of law," it has appeared to exalt its own interpretations above those of the popularly elected branches of the state governments. Under these circumstances, it is not strange that the Court's invalidation of congressional and state laws has aroused more criticism than anything else in its long history.¹ Especially has feeling been strong when the Court's adverse conclusions have been reached by a five-to-four vote of the justices, yielding what are sometimes disparagingly referred to as "one man" decisions—decisions, however, no less binding than unanimous ones.²

¹ It has repeatedly been pointed out that nowhere in the constitution can any provision be found which expressly confers upon the judiciary the extraordinary and distinctive power referred to; and this negative circumstance has led some people to argue that the framers of the constitution intentionally withheld such authority, and that, therefore, in claiming and exercising it the national judiciary has simply "usurped" power. Much time and energy have been expended by students of American constitutional history in trying to ascertain the actual intention of the framers of our fundamental law on this point. On the whole, their researches have been rather inconclusive so far as direct historical evidence is concerned. Nevertheless, the power of our courts to declare acts of Congress unconstitutional, first judicially asserted by the Supreme Court in the case of *Marbury v. Madison* in 1803, has long been generally recognized as one of the great bulwarks of both personal and property rights against legislative, and even executive, encroachment. See C. A. Beard, "The Supreme Court: Usurper or Grantee?," *Polit. Sci. Quar.*, XXVII, 1-35 (Mar., 1912), and *The Supreme Court and the Constitution* (New York, 1912). Cf. J. Dickinson, "The Functions of Congress and the Courts in Umpiring the Federal System," *Geo. Washington Law Rev.*, VIII, 1165-1178 (June, 1940).

² Such close decisions—not very numerous in earlier days—have of late tended to multiply, and some have had the effect of overthrowing laws in which large numbers of people were interested. It has sometimes been proposed that they be obviated by requiring more than a bare majority (*e.g.*, two-thirds) of the justices to concur before

Interrelations of the Judiciary, Congress, and the Executive

The
judiciary
inde-
pendent,
and yet
not so

By providing that federal judges should hold office "during good behavior," and by forbidding Congress to reduce their compensation during their period of service, the framers of the constitution sought to free the judiciary from any sense of dependence upon, or undue influence by, either the executive or Congress; and in this they were completely successful, so far as the judges individually are concerned. In performing their official duties, federal judges, personally, are far more independent of outside influences than are most of the state judges, who are elected or appointed for relatively short terms. Nevertheless, even the federal judiciary enjoys no such independence from the other branches of the government as either of them enjoys with respect to the other and to the judicial branch; and the reasons are not hard to find. In the first place, the constitution directly provides for only one federal court, the Supreme Court, leaving all inferior courts to be created and their jurisdictions to be defined by the joint action of Congress and the executive. Second, even in the case of the Supreme Court, Congress and the president have to cooperate in organizing it, in determining the number of judges, in fixing their compensation, and in regulating appellate jurisdiction. Third, all federal judges are appointed by the president and Senate.¹ Finally, the assistance of the executive may become indispensable to the enforcement of the decrees or other processes which the courts issue.

Possibility of
partisan
interference

As a result of one or more of these circumstances, it is legally possible for Congress and the president to increase the number of judges in any federal court, and, by filling the new positions with judges whose views upon questions of public policy coincide with those of the president and a majority of the Senate, to overcome or counteract the influence of what would otherwise be a majority of judges holding different views. Or, to

overruling a statute or any part thereof; and in pursuance of this objective, constitutional amendments have repeatedly been introduced in Congress making it necessary for six, or even seven, of the nine justices to agree in order to declare a law unconstitutional. Perhaps, however, an amendment is not needed for bringing about such a change; at all events, it is interesting to note that a former member of the Court (John H. Clarke) once suggested and urged that the Court itself voluntarily adopt a rule of the kind proposed. See *Amer. Bar Assoc. Jour.*, IX, 689-692 (Nov., 1923); also R. E. Cushman, "Constitutional Decisions by a Bare Majority of the Court," *Mich. Law Rev.*, XIX, 771-803 (June, 1921).

A summary of the criticisms directed against the practice of judicial review in general, and of proposed remedies, will be found in C. G. Haines, *op. cit.*, Chaps. XVI-XVII. Cases decided in recent years show certain Supreme Court justices (*e.g.*, Frankfurter and Black) inclined toward a narrowing of the scope of judicial review and others (*e.g.*, Reed and Roberts) equally inclined in the other direction.

¹ In nine instances, presidential appointments to the Supreme Court have met with outright rejection by the Senate, and in twelve others a presidential nomination has been rejected indirectly, as by failure to act or by indefinite postponement of action. These cases are listed in the 5th (1935) edition of this book, p. 436, note 2. Cf. F. R. Black, "Should the Senate Pass on the Social and Economic Views of Nominees to the United States Supreme Court?," *St. John's Law Rev.*, VI, 257-271 (May, 1932); C. W. Smith, Jr., "President Roosevelt's Attitude Toward the Courts," *Ky. Law Jour.*, XXXI, 301-315 (May, 1913).

take another possible instance, Congress may reduce the size of the Supreme Court, or of any other federal court, by enacting that vacancies shall not be filled until the number of judges reaches a certain lower point. Congress may even go so far as to deprive the Supreme Court of its appellate jurisdiction over a given class of cases, as once happened during the Reconstruction period when an unfavorable decision on the constitutionality of certain acts was anticipated. Rarely, however, has there been clear evidence of an intention on the part of either the president or Congress to "pack," or otherwise influence the decisions of, the Supreme Court. Not quite as much can be said of the inferior federal courts, over which Congress has more direct control. The Federalist Congress in 1801 created new circuit judgeships in order to enable a Federalist president to fill them with Federalist judges; and a few months later, a Jeffersonian-Republican Congress, for equally partisan reasons, abolished the new positions.¹ Happily, however, these instances of admittedly partisan interference with the judicial system stand practically alone; at the time of the latest reorganization of the federal courts, in 1911, when a separate set of circuit courts was abolished, partisan motives were entirely absent, and the same thing was largely true when the short-lived Commerce Court was abolished, in 1913, after an existence of only two years.

In extreme cases, where enforcement of court processes is resisted by combinations too strong to be overcome by United States marshals and their deputies, the federal courts are obliged to call upon the president for the aid of the armed forces. If he is unsympathetic toward the court's attitude, he may refuse to act; in which event the court is helpless and its orders or decrees may be completely nullified. An instance of this sort occurred in the administration of President Jackson, when the Supreme Court upheld certain claims of the Cherokee Indians, while the President sided with the Georgia authorities, who forcibly and successfully resisted the execution of the Court's decision.²

Enforcement of
court
processes

(Finally, it is legally possible for Congress, from partisan motives, to attack members of the federal judiciary through impeachment proceedings charging individual judges with treason, bribery, or "other high crimes and misdemeanors," as occurred in the impeachment of Judges Pickens and Chase during the presidency of Jefferson. Impeachment is the only method permitted in the constitution for the removal of judges who become unfit for judicial office for any reason whatsoever, including physical, mental, or moral defects.³) It has been resorted to, in

Impeachment of
judges

¹ M. Farrand, "The Judiciary Act of 1801," *Amer. Hist. Rev.*, V, 682-686 (July, 1900); W. S. Carpenter, "Repeal of the Judiciary Act of 1801," *Amer. Polit. Sci. Rev.*, IX, 519-528 (Aug., 1915).

² This incident arose in connection with the cases of *The Cherokee Nation v. Georgia*, 5 Peters 1 (1831), and *Worcester v. Georgia*, 6 Peters 515 (1832).

³ In the Constitutional Convention of 1787, it was proposed that, following the English analogy, federal judges be made removable by action of the two houses of Congress. But the plan was decisively defeated—unwisely in the later opinion of Thomas Jefferson.

Judges of the federal courts who have reached the age of seventy and have

all, in only nine instances, and has resulted in conviction or removal in only four.¹ A few judges of inferior federal courts have resigned when impeachment proceedings seemed imminent. But in all of this, partisan considerations have played a minor part, except in the two impeachment cases mentioned.²

✓ *The Court Reorganization Controversy of 1937*

President
Roosevelt's pro-
posal

Following seven or eight decisions in 1935-36 overthrowing statutes enacted by Congress to promote national recovery from economic depression, and otherwise to accomplish the objectives of the New Deal,³ the view gained wide currency in New Deal circles that the Court as constituted, having got out of touch with changing social and economic conditions, had become an impediment to the solution of pressing national problems; and in consequence the tribunal became the storm center of one of the bitterest political conflicts in our recent history. Among a multitude of proposals heard for reconstituting the Court or doing away with its veto upon acts of Congress, or both, the most important appeared in a message of February, 1937, in which President Roosevelt recommended that, in order "to make the judiciary as a whole less static by the constant and systematic addition of new blood to its personnel," Con-

served for ten years may "resign" and continue to draw their salaries during their remaining years. Having resigned, they, however, no longer have judicial status, and therefore Congress might, if it chose, reduce or abolish their salaries. For many years, the law also permitted all federal judges except members of the Supreme Court to "retire," after reaching the age of seventy and after ten years' service, on full pay for life. Such salaries cannot be abolished or reduced by Congress, since "retired" judges apparently continue to have judicial status. In 1937, this privilege of "retiring" was extended to Supreme Court justices. *Code of the Laws of the U. S.* (1934), 1273-1274.

¹ The successful impeachment proceedings were those against John Pickering, 1803-04; West H. Humphreys, 1862; Robert W. Archbald, 1912-13; and Halstead L. Ritter (1936). The unsuccessful cases were those against Samuel Chase, 1804-05; James H. Peck, 1830-31; Charles Swayne, 1904-05; and Harold Louderback (1933). In April, 1926, the House of Representatives, by a vote of 306 to 62, adopted articles of impeachment against George W. English, judge of the district court for the Eastern District of Illinois; but on the eve of the trial Judge English resigned, and the impeachment proceedings were discontinued. See *Literary Digest*, LXXXIX, 5-7 (April 17, 1926). Cf. *Proceedings in the Trial of Impeachment of Robert W. Archbald*, 62nd Cong., 3rd Sess., Sen. Doc. No. 1140 (1913); R. W. Carrington, "The Impeachment Trial of Samuel Chase," *Va. Law Rev.*, IX, 485-500 (May, 1923).

² J. tenBroek, "Partisan Politics and Federal Judgeship Impeachments Since 1902," *Minn. Law Rev.*, XXIII, 185-204 (Jan., 1939). In June, 1937, the House passed a bill sponsored by Representative Sumners authorizing impeachment trials of federal district judges by courts composed of three judges of the circuit courts of appeals, to be designated by the Supreme Court. The Senate might continue to conduct impeachment trials of such judges, but also might be protected by the alternative device from serious interruption of its regular business. Amid the hurly-burly of the Court reorganization controversy (about to be commented upon), the proposal failed to become law—although in 1942 a new measure of the kind made its appearance in the House. Cf. G. W. C. Ross, "Good Behavior of Federal Judges," *Univ. of Kansas City Law Rev.*, XII, 119-127 (Apr.-June, 1944); C. Pergler, "Trial of Good Behavior of Federal Judges," *Va. Law Rev.*, XXIX, 876-880 (May, 1943).

³ Notably, the National Industrial Recovery Act and the Agricultural Adjustment Act, both dating from 1933. For a general survey of the checks imposed by the Supreme Court upon New Deal legislation, see B. Rauch, *The History of the New Deal, 1933-1938* (New York, 1944), Chap. XI.

gress should authorize the appointment of an additional judge for every federal judge who, having reached the age of seventy, should fail to retire within six months thereafter, the new judges to serve concurrently with the old.¹ The total number of Supreme Court justices should, however, never exceed fifteen; so that, if the six justices then over seventy were to retire promptly, the plan need not lead to any enlargement of that tribunal at all.

Breath-taking as the proposal was, its legality and constitutionality had to be conceded; and to the degree that it was aimed at the lower courts, little opposition was voiced. Over its application to the Supreme Court, however, agitation immediately flared up. In newspapers, in letters to members of Congress, in resolutions of bar associations and of some state legislatures, appeared a "blizzard" of protests from conservatives, especially from those who had previously abhorred the New Deal and all its works and applauded the decisions that had invalidated them. Some frightened people even saw in the proposal "the death of the constitution."² In Congress, certain leaders suggested plans for compromise, while others urged postponement of the entire matter until another session, when national sentiment could more easily be ascertained.³ Brushing aside all such suggestions, however, the President, a month later, placed the issue squarely upon the basis of party loyalty and responsibility for an early solution of the nation's pressing problems.

Pros and
cons of
the plan

Although the constitutionality of the President's proposal was not open to attack, its wisdom and expediency, as well as the motives behind

¹ At the time, there were thirty judges in the federal courts of all grades who were over seventy.

² The weakest point in the President's proposal lay in the fact that although the appointment of new and younger justices might result in early "liberalization" of the Supreme Court, and thus hasten the solution of national problems that brooked no delay, there could be no assurance that five or ten years thereafter these same justices would not be found as conservative and as reluctant to retire from judicial work as the justices whom they were intended to assist or supplant. Experience shows that work on the Supreme Court often "makes liberals of conservatives and conservatives of liberals," and that presidents have more than once found themselves mistaken in the men they have named to the Court. In order to insure full realization of the end sought, namely, "the constant and systematic addition of new blood" into the national judiciary, the President's plan needed to be supplemented with a constitutional amendment providing for the compulsory retirement of all federal judges upon reaching a specified age; and such an amendment was introduced in the Senate in 1937, although not adopted.

On the President's plan, see D. O. McGovney, "Reorganization of the Supreme Court," *Calif. Law Rev.*, XXV, 389-412 (May, 1937); A. T. Mason, "Politics and the Supreme Court; President Roosevelt's Proposal," *Univ. of Pennsylvania Law Rev.*, LXXXV, 659-677 (May, 1937); G. Clark, "The Supreme Court Issue," *Yale Rev.*, XXVI, 669-688 (Summer, 1937); C. Fairman, "The Retirement of Federal Judges," *Harvard Law Rev.*, LI, 397-443 (Jan., 1938); J. E. Johnsen [comp.], *Reorganization of the Supreme Court* (New York, 1937). Cf. C. G. Haines, "Judicial Review of the Acts of Congress and the Need for Constitutional Reform," *Yale Law Jour.*, XIV, 816-856 (Mar., 1936).

³ Although certain Democratic members of Congress, as well as party leaders and lawyers outside, openly opposed the President's plan, the line-up of supporters and opponents in the country at large closely followed the alignment of "New Dealers" versus "Anti-New Dealers" prevailing in the presidential campaign of 1936. This was the point at which the deteriorating relations between President Roosevelt and Congress, characteristic of later years, really began.

it, became subjects of heated discussion in press, on platform, and over the radio. Since, like other presidents before him, he would probably appoint as judges lawyers whose views of public policy harmonized with his own (at least for the time being), the Chief Executive was charged with planning to "pack" the Supreme Court; and in this, many persons professed to see the seeds of dictatorship. Having packed the Court, so opponents contended, the President would "control" the Court's decisions, and this would lead to the overruling of earlier decisions restricting national and state powers. Such reversals could be accomplished by reading new and broader meanings into the old phrases "commerce" and "due process of law." Thus, so ran the argument, the President was seeking to amend the constitution in "an unconstitutional manner," since the people of the states would have no opportunity to pass upon such "amendments." Those who advanced this line of reasoning should have remembered that the constitution, ever since its adoption, has been undergoing changes through interpretation, and quite without resort to formal amendment. Some interpretations have been by the executive, others by Congress. But the largest number have been by the Supreme Court itself; and the changes resulting have greatly outnumbered those wrought by formal amendment.

The opposition laid great stress upon the argument that the extensions of national authority that were implicit in many of the New Deal measures went so far beyond the original division of powers between nation and states, and were so contrary to past Court interpretations, that they ought to be embodied in a formal amendment to the constitution. In rebuttal, it was pointed out that immediate and pressing national problems could not be dealt with promptly through the amending process, and that, even if quickly agreed upon in Congress and promptly ratified by the states, an amendment, to be effective, would have to be interpreted and applied by judges who very well might frustrate its effectiveness.¹

Still further, it was contended that, however wisely President Roosevelt might select new judges, there would be grave danger that the power would be abused by succeeding presidents and Congresses; from which the conclusion was drawn that the power requested should not be granted. On the other side, it could be argued with equal force that almost any power conferred upon the executive or any other branch of the government is liable to abuse; and that if the government possessed only powers that could not possibly be misused, it would be so anæmic as to be incapable of doing either good or harm. In fact, it would be hard to find

¹ No one can foresee the interpretations and effects that may be given to language used in an amendment. A case in point is the Supreme Court's interpretation of the Sixteenth Amendment. Although Congress was expressly given the power to tax incomes "from whatever source derived," the Court ruled otherwise. See *Evans v. Gore*, 252 U. S. 245 (1920), and the testimony of Assistant Attorney-General Robert H. Jackson before the Senate judiciary committee, in *N. Y. Times*, Mar. 12, 1937.

a proposal to add in any major way to the government's powers that has not stirred similar dire predictions.¹

Finally, it was objected that adoption of the President's plan would destroy our system of checks and balances by depriving the Supreme Court of its existing "supremacy" and making it subordinate to Congress and the executive. To this it could be replied that Congress and the executive are chosen by the people, and that the only "supremacy" over them which may be conceded to the Supreme Court is to be found in the Court's *absolute* veto of measures that they have enacted. Not only would this "supremacy" not be impaired by adoption of the President's recommendation, but such adoption might forestall more radical measures that would curtail or destroy the Court's right to review legislation. No other legitimate supremacy can be claimed for the judiciary; for, as the Court itself has often said, the powers of the government are vested in three "coördinate" branches; and the idea of coördinate branches excludes the notion that any one of them is superior to the others. Furthermore, since the constitution itself expressly authorizes Congress and the executive to regulate appeals to the Supreme Court and to create inferior courts, and by clear implication gives them the right to fix the number of judges in all federal courts, it can hardly be argued convincingly that the founding fathers intended to exempt the judiciary from changes deemed wise by the executive and Congress.

A bill embodying the President's recommendations was introduced in the two branches of Congress simultaneously, and in the Senate judiciary committee it became the subject of one of the most prolonged and heated public hearings in congressional history. In the end, it was reported unfavorably;² and a substitute measure was killed also by being referred to the same hostile committee. The President's defeat was, however, alleviated by a number of new developments; and in the long run the substance of what he was aiming at, i.e., scope for remedial legislation, was largely attained. In the first place, the Supreme Court, even during the period of the controversy, showed some change of heart by handing down decisions upholding such New Deal measures as the amended Railway Labor Act (1934), the Labor Relations Act (1935), and the Social Security Act (1935)³ and (reversing an earlier decision) sustaining a Washington minimum wage law. In the second place, "conservative" Justices VanDevanter and Sutherland retired, opening the

The out
come

¹ When, for example, the constitution was being ratified some hundred and sixty years ago, the provision making the president commander-in-chief of the Army and Navy was violently assailed in the belief that it "opened the door to a Cromwell." Furthermore, abstention at a given time from using an undoubted power carries no guarantee that the power will not be used by others later on. Six times, the size of the Supreme Court has been changed, either by increasing or by reducing its membership. But these changes have not deprived the tribunal of its independence, its power, or its prestige.

² Sen. Rep. No. 711, 75th Cong., 1st Sess. (June 14, 1937).

³ See pp. 608, 613, 624 below. Between 1937 and 1944, indeed, the Court overruled its own earlier decisions no fewer than twenty-four times.

way for the appointment of "liberal" Justices Black¹ and Reed; and in 1939 the death of "conservative" Justice Butler was followed by appointment of "liberal" Justice Murphy. With a completely "liberalized" Court in early prospect (and since realized²), and with the newer justices obviously developing canons of constitutional interpretation less rigid and restrictive than those dominating in the recent past,³ even the President's interest in Court reorganization through legislative action waned; and almost before the country was aware, the controversy passed into history—although not without reverberations in the form of an effort of Mr. Roosevelt in the congressional elections of 1938 to "purge" his party of candidates who had been active in opposing his plans.⁴

Improve-
ments re-
lating to
the lower
courts

Although frustrated in his original major effort, the President shortly afterwards found consolation, too, in the passage of an act embodying a number of recommendations relating to the lower federal courts.⁵ When signing this measure, he pointed out that while it failed to provide for a number of needed changes, it nevertheless contained several provisions which were "definitely a step in the right direction." The government, for example, now became able, through the Department of Justice, to

¹ V. M. Barnett, Jr., "Mr. Justice Black and the Supreme Court," *Univ. of Chicago Law Rev.*, VIII, 20-41 (Dec., 1940).

² The retirement of Justice McReynolds in 1941 removed the most stalwart of the Anti-New Dealers. Seven of the nine members of the Court today (1945) were originally named by President Roosevelt, and all except possibly one (Justice Roberts) are regarded as "liberals." On the confused pattern, however, which makes it hazardous to generalize very freely on conservative-liberal alignments, see C. H. Pritchett, "Dissent on the Supreme Court," *Amer. Polit. Sci. Rev.*, XXXIX, 42-54 (Feb., 1945).

In 1944, the federal judiciary as a whole numbered some 305 members (sitting as judges), and the number of judicial appointments (including a few reappointments) to that date made by Roosevelt (during approximately eleven years in office) stood at 296.

³ This is explained clearly in R. E. Cushman, *What's Happening to Our Constitution*, 3-10; and the trend has been continued in later years, as vividly illustrated by a decision of March 27, 1944 (in *United States v. Yakus*, 321 U. S. 414) sustaining the constitutionality of the Emergency Price Control Act of 1942, and (as the Court expressly asserted) overruling the *Schechter* decision.

⁴ For the President's later expressed opinion that the Court fight of 1937 "marked a definite turning point in the history of the United States," see an article published under his name in *Collier's*, CVIII (Sept. 13 and 20, 1941). Whether or not such significance is properly to be attached to the Court controversy in and of itself, few if any developments in recent decades have higher importance than the manning of the Supreme Court with a personnel responsible since 1937 (1) for tearing away the old constitutional barriers which left business and private enterprise relatively free from federal control, and (2) by the same token, for legalizing the New Deal, with emphasis upon the use of federal powers in behalf of the rights of the individual rather than for the protection of property and corporate interests. In feeling their way toward a determination of the proper limits of the increased controls over property and business exercised by federal agencies, the members of the new Supreme Court, however, find themselves holding widely differing views; and this is one of the reasons for the numerous, and sometimes sharply worded, clashes of ideas mentioned above and notoriously characterizing their decisions and opinions in the last few years. See especially the article by C. H. Pritchett cited above (p. 462, note 4); M. J. Pusey, "The Roosevelt Supreme Court," *Amer. Mercury*, LIX, 596-603 (May, 1944); K. C. Davis, "Revolution in the Supreme Court," *Atlantic Mo.*, CLXVI, 85-95 (July, 1940); and T. R. Powell, "Our High Court Analyzed," *N. Y. Times*, June 18, 1944.

⁵ 50 U. S. Stat. at Large, 751-753.

defend acts of Congress under attack in the lower courts as being unconstitutional; and appeals to the Supreme Court in such cases are expedited. The new law also puts an end to the hasty granting of injunctions by lower courts to restrain government officials in the execution of federal statutes; and it imparts greater elasticity to the method by which judges may be assigned to jurisdictions suffering from a congestion of business.¹

National Courts Outside of the "Federal Judicial System"

The courts thus far described form what is technically known as the "federal judicial system," and, inasmuch as they are provided for in the judiciary article, they are often called the "constitutional courts," in order to distinguish them from certain special courts which have been created by Congress under powers implied mainly from other parts of the constitution, and therefore called "legislative courts."² In creating and organizing these courts (which include all of the federal courts in the territories), Congress has a very free hand with respect to the tenure, compensation, and appointment of judges, as also the scope of jurisdiction and methods of procedure; indeed, it is in no way bound by any of the limitations found in the judiciary article. It may, for example, provide that the judges shall serve for only limited terms instead of during good behavior, and in several instances it has done so.

Under the power to regulate commerce and to grant patents, Congress, in 1909, authorized a Court of Customs and Patent Appeals,³ to hear and decide appeals from rulings made by the United States Customs Court⁴ in administering tariff laws and by the commissioner of patents in administering the patent laws. Under power to appropriate money to pay the debts of the United States, Congress created, in 1855, a Court of Claims, primarily for the purpose of investigating contractual claims against the government.⁵ In some cases, this court's decisions are final, subject to appeal to the Supreme Court; in others, it merely reports its findings to Congress or to the department concerned. Both of these courts are thus largely administrative courts. Under expressly granted power to govern territories, regularly organized courts have been created in all of the territories and major dependencies.⁶ The grant of exclusive authority over the District of Columbia has opened the way for Congress to

¹ The act creating the Administrative Office of United States Courts (1939) was also a direct result of the President's recommendations in 1937. See p. 472 above.

² W. G. Katz, "Federal Legislative Courts," *Harvard Law Rev.*, XLIII, 894-924 (Apr., 1930).

³ The Court of Customs and Patent Appeals consists of five judges, appointed by the president and Senate.

⁴ This is the new name given the board of general appraisers in 1926. The court consists of nine judges, appointed by the president and Senate. *Code of the Laws of the U. S.* (1934), 892-893. Cf. G. S. Brown, "The United States Customs Court," *Amer. Bar Assoc. Jour.*, XIX, 333-336, 416-419 (June, July, 1934).

⁵ The Court of Claims consists of five judges appointed by the president and Senate. *Code of the Laws of the U. S.* (1934), 1260-1266; E. E. Naylor, "The United States Court of Claims," *Georgetown Law Jour.*, XXIX, 719-733 (Mar., 1941).

⁶ See Chap. xxxvi below.

"Constitutional" and "legislative" courts

Some example

provide the people of the District with a court of appeals, a supreme court (inferior to the former), and several subordinate municipal courts.¹ The Tax Court of the United States was created by the Revenue Act of 1942² to decide questions arising over alleged deficiency in, or overpayment of, income, estate, excess profits, and other direct taxes, with review by a circuit court of appeals.³ Lastly, the Emergency Price Control Act of 1942⁴ created an Emergency Court of Appeals, consisting of three or more judges to be designated by the chief justice of the United States from judges of the district courts and the circuit courts of appeals. This Emergency Court hears appeals of persons who deny the validity of any order or regulation issued by the Office of Price Administration,⁵ and its judgments and orders are reviewable by the Supreme Court.

*The Department of Justice*⁶

Following English and colonial precedent, Congress provided in the Judiciary Act of 1789 for an attorney-general who should advise the

¹ The courts of the District of Columbia have been held to be "constitutional" courts in certain respects and "legislative" courts in others. *O'Donoghue v. United States*, 289 U. S. 516 (1934).

² 56 *U. S. Stat. at Large*, 957. The Tax Court has sixteen judges. Between 1924 and 1942, it was called the United States Board of Tax Appeals. *U. S. Government Manual* (Summer, 1944), 559-560.

³ In pursuance of treaties which conferred extraterritorial rights in China, a United States Court for China was set up in 1906 at Shanghai, to pass upon appeals from decisions of the American consular courts in that country; and from its decisions appeals could be taken to the federal circuit court of appeals for the ninth circuit, and ultimately to the Supreme Court. Cf. M. J. Helmick, "United States Court for China," *Amer. Bar Assoc. Jour.*, XXVII, 544-546 (Sept., 1941).

The work of the United States Court for China ceased immediately upon the outbreak of war with Japan; the judges and other members of the staff were interned and later came back to the United States. Moreover, the Court itself has been abolished, coming to an actual end on May 20, 1943, with exchange of ratifications of the treaty doing away with extraterritorial rights of the United States in China. Cf. E. D. Thomas, "Extraterritoriality in China," Senate Doc., No. 102, 78th Cong., 1st Sess. (1943).

As has appeared, the United States has a few isolated administrative courts, such as the Court of Customs and Patent Appeals, but no general system of such tribunals charged with adjudicating disputes arising out of decisions rendered by executive and administrative agencies to which Congress has delegated quasi-judicial powers in some thirteen hundred instances. Cases arising under powers thus delegated by Congress are now ruled upon by more than seventy federal agencies, acting independently of one another and with no means provided for coordinating their work. To overcome the resulting overlapping and lack of uniformity of decisions, a committee of the American Bar Association, in July, 1936, submitted a report recommending the establishment of a federal administrative court, similar to some in Europe, to deal solely with cases arising in the exercise of powers delegated by Congress, the decisions of this administrative court to be subject to review by the Supreme Court or by lower federal courts. The committee's report is summarized in *N. Y. Times*, July 27, 1936. Cf. L. G. Caldwell, "A Federal Administrative Court," *Univ. of Pa. Law Rev.*, LXXXIV, 966-990 (June, 1936); R. M. Cooper, "The Proposed United States Administrative Court," *Mich. Law Rev.*, XXXV, 193-252 (Dec., 1936).

⁴ 56 *U. S. Stat. at Large*, 23.

⁵ C. W. Stewart, "The Emergency Court of Appeals," *Georgetown Law Jour.*, XXXII, 42-65 (Nov., 1943).

⁶ This establishment is an *executive department*, and not a part of the judiciary. Its functions and operations, however, warrant bringing it into any discussion of the federal system of administering justice.

government on legal matters and represent it in judicial proceedings. This officer was not expected to give all of his time to the work, and he was not made the head of a department, although as soon as the cabinet developed he became a member of that group. With the growth of the country and of the government's activities, the duties of the position naturally increased. Solicitors and other assistants were provided for; the attorney-general gave up all private practice; and at last, in 1870, under pressure of the great volume of legal work flowing from the Civil War and Reconstruction, Congress belatedly established a Department of Justice in which the government's legal business was for the first time concentrated and systematized. Even after tripling its force of officers and employees to cope with wartime conditions, the Department of Justice is smaller than most others. But it performs exceedingly important functions, and no department, except perhaps the Treasury, is so interlocked with the others. The principal officers in Washington are the attorney-general, who gives his time mainly to studying and rendering opinions on legal questions referred to him by the president or heads of departments; a solicitor-general (with also an assistant solicitor-general), who represents the United States before the courts;¹ an assistant to the attorney-general, who has supervision over all the major subdivisions of the Department and over the district attorneys and marshals; an assistant attorney-general, who has special charge of cases arising out of the national anti-trust and interstate commerce laws; and six other assistant attorneys-general, with such duties as are assigned to them by the head of the Department. Included in the Department also are a Federal Bureau of Investigation—the famous FBI—with 15,000 special agents and other personnel, and with functions paralleling and supplementing those of the secret service in the Treasury, including, of course, the crime-detection work of the highly efficient "G-Men"; an Immigration and Naturalization Service, which, in 1940, was transferred from the Department of Labor to the Department of Justice;² a Bureau of Prisons; and a War Division, set up in 1942, with an Alien Enemy Control Unit and an Alien Property Unit.³

Officers
in Wash-
ington

Outside of Washington, the Department has a district attorney and a marshal in each of the eighty-four judicial districts into which the states are divided, besides others in Alaska, Hawaii, Puerto Rico, the Virgin Islands, and the Panama Canal Zone. Both offices date from 1789, and their incumbents are appointed by the president and Senate for four-year terms, on recommendation of the attorney-general. A district attorney presents to a grand jury all violations of national laws coming to his attention within his area; and if that body brings an indictment, it falls to him to conduct the case of the government against the accused person.

Field
force

¹ C. Fahy, "The Office of Solicitor-General," *Amer. Bar Assoc. Jour.*, XXVIII, 20-23 (Jan., 1942).

² See pp. 119 and 121 above.

³ *U. S. Government Manual*, (Summer, 1944), 259-270.

His work, therefore, corresponds to that of county prosecuting officers who act under state authority; and over it the attorney-general has a somewhat indefinite supervision. The marshals and their deputies are charged with arresting and holding in custody persons accused of crime, summoning jurymen, serving legal processes, executing the judgments of the federal courts, and protecting federal judges from personal violence when engaged in the performance of their official duties.¹

Princi-
pal func-
tions

Speaking broadly, the Department of Justice has two main functions. The first is to give opinions to the president and other principal officers of the government on questions touching their duties and involving construction of the constitution or the laws. The courts will answer such questions only in deciding actual cases, and cannot be looked to for advisory opinions on constitutional and legal matters coming up almost daily in the carrying on of the government's work. For these, the officials concerned are dependent upon the attorney-general and his principal assistants. In many instances, the opinions rendered prove final and conclusive, and hence determine the law; and sometimes they profoundly influence the political, as distinguished from the purely legal, policies of the government. Opinions are published, after the manner of judicial decisions, and acquire weight as precedents in a similar way. They are not furnished to Congress or its committees, but only to the executive authorities; nor are mere departmental regulations ruled upon, or abstract or hypothetical questions answered.

The second main function of the Department is to supervise or conduct suits to which the United States is a party and to prosecute offenders against the revenue, currency, commerce, banking, postal, and other national laws. Suits begun by the government are brought before a district court or the Supreme Court, according to the nature of the case; and while suits against the government are not allowed as a matter of right, they are in fact permitted, and are instituted in a district court, or in the special Court of Claims. In the lower courts, the government, whether plaintiff or defendant, is commonly represented by the district attorney of the district in which the action is begun; in the Supreme Court and Court of Claims, by the attorney-general or one of his principal assistants.²

¹ The duties of district attorneys and marshals are set forth more fully in *Code of the Laws of the U. S.* (1934), 1281-1286. Cf. R. H. Jackson, "The Federal Prosecutor," *Jour. of Amer. Judic. Soc.*, XXIV, 18-20 (June, 1940). It may be added that in each judicial district, the district judge appoints a number of United States commissioners, who hold office for four years, subject to removal at any time by the appointing judge. These commissioners are empowered to administer oaths, issue warrants for the arrest of persons accused of violating federal laws, subpoena witnesses, conduct preliminary hearings of accused persons, and discharge them or admit them to bail. In numerous other ways, also, they assist in expediting the enforcement of the federal criminal laws.

² Two minor, although not unimportant, functions of the Department are advising the president on requests for pardons and the administration of the federal penitentiaries at Atlanta, Leavenworth, Lewisburg, Pa., McNeil Island, and Alcatraz Island in San Francisco Bay, and of the jail and reform schools in the District of

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2. FUNCTIONS AND SERVICES

CHAPTER XXIV

NATIONAL EXPENDITURES—THE BUDGET SYSTEM

Many activities of the national government have now been brought to view, but others of major importance still claim our attention; and to some of these we now turn. Basic to everything else is the raising and spending of money; for, as the struggling government under the Articles of Confederation quickly discovered, little can be done without adequate access to funds. A prudent individual first calculates his resources and then trims his outlays so as to keep within them. A government, too, cannot be indifferent to its flow of income. But since it can accelerate the flow indefinitely, *e.g.*, by increasing taxes and by borrowing, it can, and often must, decide upon expenditures first, and only afterwards shape its plans for obtaining the necessary funds. Taking our cue from this fact, we, in this chapter and the next one, consider first some aspects of national expenditure, and then look into the matter of national revenue.

The Spending Power

The constitution has rather more to say about raising revenue than about spending it: authority to tax, as well as to borrow, is expressly conferred; and various limitations upon the taxing power are carefully prescribed. A government, however, that could not spend money would be no government at all; and ample federal spending power is found in the constitution, not only in the authorization of Congress to "pay the debts and provide for the common defense and general welfare of the United States,"¹ but in various other provisions conferring authority to do things that cannot possibly be done without spending money, *e.g.*, raise and support armies, provide and maintain a navy, establish post-offices and post-roads, provide for the government of the District of Columbia and the territories, and set up a system of courts. Only three specific restrictions are imposed: (1) that appropriations for the support of the Army shall not be "for a longer term than two years"; (2) that "no money shall be drawn from the Treasury but in consequence of appropriations made by law"; and (3) that "a regular statement and account of the receipts and expenditures of all public money shall be published from time to time."²

Constitutional basis

No one acquainted with our early constitutional history would, how-

¹ Art. I, § 8, cl. 1.

² Art. I, § 8, cl. 12, and § 9, cl. 7.

Broad
interpretation

ever, be surprised to learn that strict constructionists and loose constructionists viewed the federal spending power quite differently. Madison, for example, contended that the power to tax and to spend could legitimately be exercised only to such extent as was necessary for the execution of the *other* powers delegated to Congress. Hamilton, on the other hand, argued that the taxing-spending power was independent of, and in addition to, the other powers. And the view of Hamilton prevailed. Not only has Congress habitually acted on the assumption that its spending power is practically unlimited, but no appropriation made (even when for objects, like public health or education or old-age benefits, lying quite outside the range of expressly conferred powers) has ever been challenged successfully in the courts; nay more, in its memorable decision of 1936 invalidating the Agricultural Adjustment Act of 1933, the Supreme Court expressly asserted that the power of Congress to authorize the expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the constitution—which is, of course, exactly what Hamilton contended a century and a half ago.¹ Not only, too, may Congress spend without restraint, either as to purpose (so long as it is of a public nature) or as to amount, but it may spend under such circumstances as to bring it great extensions of power, as, for example, when it gains regulative authority in the states through the medium of grants-in-aid for highways, education, and social security.

How Appropriations Are Made—The Budget System

The rôle
of Con-
gress

Not a dollar of federal money can be expended legally except in pursuance of authorization, direct or indirect, by Congress; and passing the great appropriation bills becomes one of the most important tasks of that body at every regular session. In those measures, Congress, in effect, instructs the Treasury to supply the executive departments and other spending agencies with stipulated sums, according to specifications set forth in great detail. Indeed, one of the chief means by which Congress exercises control over administration is this detailed and specific allocation of money, cutting off an activity here by leaving it without financial support, adding an activity or agency there by making the necessary fiscal provision, and in these and other ways predetermining far more than do some foreign parliaments the lines on which the government's work shall be carried on.²

For many years before the adoption of the present budget system in 1921, appropriation bills were drafted and introduced by no fewer than nine separate House committees—the bills themselves regularly num-

¹ See p. 573 below. The opposing views of Hamilton and Madison, as summarized in the briefs in *United States v. Butler*, 297 U. S. 1 (1936), are reviewed in *Amer. Bar Assoc. Jour.*, XXII, 115-125 (Feb., 1936).

² In Great Britain, Parliament is content to vote lump sums for various purposes and to leave the administrative authorities—acting under close control by the Treasury—to make detailed application of the funds, including the fixing of salaries and wage-scales.

bering fourteen—and in the Senate were handled by as many as fifteen different committees. Based upon more or less inflated requests made by the various spending agencies, and merely swept together and transmitted to Congress in an undigested mass by the secretary of the treasury, these bills were not only framed, but considered and reported by the several committees, in little or no relation to one another—and, what was worse, in little or no relation to the condition of the Treasury or to the outlook for revenue. With no single guiding hand to exercise restraint, they were likely to emerge even more generous in their grants than when they first made their appearance; and although the president might warn and admonish, he as a rule could do nothing in the end except affix his signature, since to do otherwise would mean to halt necessary government activities. Under such division of responsibility, log-rolling became a fine art, the “pork-barrel” an inexhaustible resource—especially as resorted to by congressmen whose standing with their constituents depended principally upon their success in tapping public funds in support of pensions, river and harbor improvements, and public buildings. As often remarked at the time, any private business conducting its financial operations as those of the United States government were conducted would stand perpetually in the shadow of bankruptcy.

Loose
methods
of appro-
priation
before
1921

In days when expenditures were relatively modest and revenues adequate to meet them, criticism of such haphazard procedures had little or no effect. The startling upswing of the national outlays during the first World War, however—together with the many fiscal problems and difficulties entailed—lent new force to a growing demand for reform; and in 1921 a national budget system, such as had long been talked about, became a reality. The essence of a sound budget system consists in careful planning of the expenditures of a given period in relation to anticipated income, by a single authority, which not only will achieve the necessary correlation but shoulder definite responsibility for results; and while the plan introduced by the Budget and Accounting Act of 1921¹ left, and still leaves, a good deal to be desired, it is grounded firmly on this general principle.

The
Budget
and Ac-
counting
Act of
1921

The planning and coördinating agency set up by the act is the Bureau of the Budget, originally attached loosely to the Treasury Department, although in effect an independent establishment. As supreme director of national administration, the president is, however, the logical authority to bear primary responsibility for preparing integrated programs of spending and revenue-raising; and after Franklin D. Roosevelt became chief executive, the Bureau was drawn into closer relations with the White House until eventually, under authority conferred in the Reorganization Act of 1939, it was absorbed outright into the Executive Office of the President. It is now, therefore, no longer to be thought of as an isolated establishment, but rather as an arm of the president—

The
Bureau
of the
Budget

¹ 42 U. S. Stat. at Large, 20.

the agency through which that official maintains touch with the entire financial side of the government and secures the spade-work necessary to preparation of the expenditure proposals which he lays before Congress.¹ Since this status was arrived at, the Bureau has been given more adequate support, has reorganized and greatly expanded its fiscal (as well as other) work, and, under the direction of an able "career man," Harold D. Smith, has become one of the most vigorous and effective establishments in Washington.²

The
Bureau's
expanded
role

In the nearly twenty-five years since the Budget Bureau was created, a great change indeed has taken place in it. From an agency devoted primarily to the coordination of departmental requests for funds, it has developed into the principal aid to the president in the general management of governmental affairs. The conception of the budget itself has expanded to include the formulation of well-defined financial programs for the various departments and establishments, and also supervision of and control over the execution of such programs, including continuous study of administrative organization and adoption of improved business methods in connection therewith. Resulting in part from the enlargement of governmental activities in fighting the depression of the thirties, the new situation has arisen mainly from the defense and total-war efforts of more recent years. Greater responsibilities than ever before have been thrust upon the president, and in assuming them, he has been compelled to pass along extensive authority to departments and other agencies. For the use which they make of such delegated authority he, however, as chief executive, is responsible; and it is mainly upon the Bureau of the Budget that he must rely for assurance that the authority is being properly exercised.

Such service the Bureau is able to render through the basic power given the director to "revise, reduce, or increase" the estimates of the several departments and agencies—a power from which flows broad discretion over the substance of department programs, not only in the planning stage but also later; because after the programs have received Bureau approval, and after Congress has made the necessary appropriations, the departments and establishments must still obtain the Bureau's approval for their financial procedures in carrying out their programs, including the periodic (usually monthly) allotment of funds and the maintenance of reasonable reserves for contingencies. In addition, since 1939, a division of legislative reference in the Bureau has examined and reported upon all measures pending in Congress which, if enacted, would impose a charge upon the public treasury or otherwise affect the president's fiscal policy, the purpose being to determine the relation of such measures to the "financial program of the president";³

¹ As pointed out below, *tax* proposals emanate rather from the Treasury Department, although not without consultative participation by the Budget Bureau.

² The director is appointed by the president alone, and for an indefinite term.

³ If, too, the Budget Bureau does not think well of a measure passed, it may, and sometimes does, prepare a veto message and advise the president to sign it.

and the coöperation of this division, and of four others, in all budget activities enables the Bureau to play a highly effective rôle in making recommendations and decisions affecting both the substance and the administration of the government's program.¹

Although of doubtful advantage, the government's fiscal year opens on July 1, rather than January 1; and a given year is hardly entered upon before work on the financial arrangements for the succeeding year is started. First of all, every spending agency is asked by the Budget Bureau to make out detailed estimates of the funds that it will need in the next fiscal year and to submit such estimates not later than September 15. In larger agencies, this is done by special budget officers; in lesser ones by members of the staff detailed for the purpose; and for many weeks, conferences go on between these or other agency representatives on the one hand and Budget Bureau officials on the other—the former commonly pressing for as generous allotments as they can hope to get, the latter raising questions, offering objections, and seeking to whittle down the frequently somewhat extravagant requests. On larger matters, the budget director is brought into the discussions; and, subject only to reversal by the president, his word is law for every bureau, board, commission, and department as to what expenditures (and in what amounts) shall be recommended to Congress, and what ones shall not. Meanwhile, the Treasury Department, on its part, has been asked not only for data concerning interest charges on the national debt, but also for detailed estimates of the revenues that may be expected in the period, together with proposals for increasing such revenues in case they promise to be insufficient. With all of the estimates and other information finally in hand (ordinarily by December 1), Bureau officials total up the amounts, arrange data in logical order, and work the whole into a

Preparing the budget

¹ The Bureau carries on its work through five principal divisions, exchanging information and working in close coöperation with one another: (1) largest of all, the estimates division, which revises estimates and determines apportionments and general reserves; (2) the legislative reference division mentioned above; (3) the division of administrative management; (4) the fiscal division, handling the huge mechanical job of compiling the budget document; and (5) the division of statistical standards, formerly the central statistical board, coördinating the statistical work of the departments and establishments. In addition to its other duties, the Federal Reports Act of 1942 (56 *U. S. Stat. at Large*, 1078-1080) made the Bureau responsible for the data-collection activities of most federal agencies, the purpose being to reduce the burden upon the public resulting from government questionnaires and reports. See L. Stringham, "Government Questionnaires and Federal Reports Act of 1942," *Pub. Admin. Rev.*, III, 150-157 (Spring, 1943). In 1935, the staff of the Bureau numbered only thirty-eight persons; by 1942, 356 were employed. The 1943 appropriation measure provided for 592 employees; and for fiscal 1944, the president requested a total of 660.

An especially valuable analysis of the functions of the Bureau is N. M. Pearson, "The Budget Bureau: From Routine Business to General Staff," *Pub. Admin. Rev.*, III, 126-149 (Spring, 1943). The functions and duties of the Bureau are summarized broadly in Executive Order No. 8248, Sept. 8, 1939, Title II, § 2, to be found in *Federal Register*, IV, 3864-3865. Cf. H. W. Wilkie, "Legal Basis for Increased Activities of the Federal Budget Bureau," *Geo. Washington Law Rev.*, XI, 265-301 (Apr., 1943); H. D. Smith, "The Budget as an Instrument of Legislative Control and Executive Management," *Pub. Admin. Rev.*, IV, 181-188 (Summer, 1944).

volume of many hundred pages—*i.e.*, the “budget”—which, by the close of the calendar year, is placed on the desk of the president. At this last moment, the latter can revise or strike out items. But usually he has already assented to most of them; and, with Congress coming into regular session normally on January 3, he, within a few days after his regular message, submits a special message transmitting the budget as a balanced fiscal plan for which he assumes full responsibility.¹ Thus evolved, a budget presents the utmost contrast to the *mélange* of independent appropriation proposals formerly unloaded upon Congress by its various committees. The president becomes, in effect, the general business manager of the government, with the Budget Bureau as the agency through which he prepares his proposals. The rôle of Congress, in turn, is more or less like that of a board of directors which, following inquiry and discussion, translates proposals into decisions.²

The
budget
before
Congress

In 1920, with the adoption of a budget system imminent, the House of Representatives prepared for the new order of things by enlarging its general appropriations committee to thirty-five members, giving it jurisdiction over all appropriation proposals, and authorizing it to employ as many as fifteen sub-committees for handling proposals relating to particular departments or agencies.³ Received in the House, a budget's revenue proposals are turned over to the committee on ways and means, but its far more bulky appropriation sections go at once *in toto* to the appropriations committee, which forthwith parcels them out among its sub-committees, in such fashion that all proposals relating, for example, to the War Department will go to the same sub-committee. From the sub-committees come in due time bills embodying the different blocks of proposals, more or less drastically altered; and through the main committee these are laid before the House for debate, and perchance amendment, and then sent to the Senate, where again they are handled by a general appropriations committee and a set of sub-committees before emerging as measures to be passed on the floor. As individually adopted (usually after conference committees have been called into play), the bills are sent to the White House and almost invariably signed;⁴ no

¹ The budget message of January 9, 1945, will be found in *N. Y. Times* of the following day.

² If unanticipated necessity arises, supplementary and deficiency estimates may be presented to Congress after submission of the regular budget; and “deficiency” appropriation bills are passed at almost every session. It is hardly necessary to add that in a war period like the present, special—and huge—appropriations become necessary without much reference to the regular calendar.

³ The number of members has since been increased to forty-three (in 1945, twenty-five majority and eighteen minority). The corresponding Senate committee has twenty-four members (in 1945, fourteen majority and ten minority). In 1940, the Brookings Institution recommended that the separate House and Senate appropriations committees be replaced by a single joint appropriations committee of the two houses, equipped with a permanent staff of budget and fiscal experts.

⁴ Appropriation measures, like others, are, of course, subject to veto. Seldom, however, can they be disapproved without more or less disrupting some branch of the government's activities, even when they include provisions to which the chief executive objects.

attempt is made to gather them all into a single grand appropriation measure, as in Great Britain.

During the quarter-century since the new system went into operation, it has abundantly proved its worth. Under the relatively normal conditions prevailing in the earlier part of the period, it enabled the president to hold the spending agencies in leash and to effect substantial economies; and even in the years of extraordinarily lavish expenditure associated with the New Deal and with the defense and war effort, when the executive rather than Congress was taking the lead in projecting huge outlays, it imparted unity and responsibility which otherwise would have been lacking. Not only does it open a way for more or less drastic reduction of ill-considered departmental estimates before they are sent to Capitol Hill, but it enables Congress to act with full information concerning not only current proposals and their relations to one another but the state of the country's finances generally, the recent and present trends, and the outlook for at least two or three years to come.¹ Indeed, after appropriations have been voted, the president, if he thinks that Congress has been over-generous, may order the agencies affected to spend less than the amount authorized. Of course, power is always in danger of being abused, and it is quite possible for not only Congress, but also the president, to strangle or starve deserving administrative services, ostensibly or actually in the interest of economy, especially if considerations of politics tempt to such a course. Extravagance is, however, by all odds the evil chiefly to be combated in public finance; and the restrictive powers conferred in the act of 1921 have been employed mainly for this worthy end.²

A useful
reform—
but in-
complete

There is, however, room for improvement. It would be advantageous, for example, if department heads and the director of the budget were given the privilege of the floor in Congress, so that they might explain budgetary proposals (or omissions) to the general membership of each house, as they now explain them to individual leaders, committees, and sub-committees. Appropriation bills of general character are no longer introduced except by the regular appropriations committee. But representatives and senators freely exercise their privilege of introducing

¹ Despite its admitted merits, the form of the budget statement, as simply a plan of expenditures, has been criticized sharply both by members of Congress (notably Senator Byrd of Virginia) and by outsiders. The Securities and Exchange Commission, for example, submitted to the Temporary National Economic Committee, in 1939, a plan for a "double budget" under which expenditures would appear in two groups, one including all operating expenses and the other all expenditures for public buildings and other similar non-recurring outlays.

² In the report of the President's Committee on Administrative Management in 1937 (see pp. 412-413 above), the Budget Bureau, while criticized in sundry respects, was given credit for the spotlight it had thrown on national fiscal problems, for assisting the president in planning and controlling the fiscal program, for a detailed scrutiny of department needs, for aiding the departments in improving their budgetary practices, for giving Congress a more intelligent picture of the nation's finances and financial problems, and for clear comparisons between estimates and actual expenditures of particular agencies and services.

bills calling for appropriation of money for particular projects—building a post-office, constructing a dam, dredging a harbor, or “improving” a river—in which they (at all events the voters back home) are interested. Moreover, from the moment when a House sub-committee takes hold of a block of estimates to the time when an enacted bill results, sums carried by particular items can be augmented and new items inserted. It would save the taxpayers millions of dollars a year if Congress were to emulate the example of the British Parliament, and, as a matter of regular practice, refrain from voting any money in excess of sums requested by the executive. At the least, if present usage is to continue, it would be helpful if, by constitutional amendment, the president were given power to veto separate items of appropriation bills, as governors in all but nine states have been authorized to do.¹

Execut-
ing the
budget—
the Gen-
eral Ac-
counting
Office

In its report of 1937, the President's Committee on Administrative Management criticized the Budget Bureau for concentrating too much upon the preparation of budgets and not giving enough attention to “supervision over the execution of the budget by the spending agencies.” As the committee was frank to recognize, the Bureau had never up to that time been given sufficient staff or money to enable it to perform this larger task. To a degree, the situation has now been corrected; and a great deal is done by way of checking up on the use actually made of funds voted, and supervising the transfer of funds from one agency to another. There is need for such work, notwithstanding the existence of another agency—the General Accounting Office—created, in point of fact, by the same act of 1921 which brought the Budget Bureau into existence. In addition to auditing the accounts of spending agencies, this independent establishment—independent because its head, the comptroller-general, is appointed by the president and Senate for a fifteen-year term, and is removable only by impeachment or, for cause, by joint resolution of Congress—has as a main function the validating of payment for services, supplies, etc., as a means of seeing that all such outlays fall within the purposes and limits of appropriations as made by Congress; without the comptroller-general's approval, money for such purposes cannot be drawn from the Treasury, or, if drawn and paid over, must be re-funded. After 1933, the General Accounting Office became a focus of vigorous controversy, partly because the then comptroller-general, John R. McCarl, personally hostile to the New Deal, held up numerous payments in connection with New Deal enterprises as lacking proper authorization in congressional appropriations;² and in 1937 the President's Committee made recommendations, eagerly accepted by the President himself, looking to abolition of the Office, transfer of “pre-audits” to the Treasury Department, and retention of post-audits in a new agency to

¹ See pp. 378-379 above and pp. 791-792 in complete edition of this book.

² Cf. C. H. Pritchett, “The Relations of the T.V.A. to the Comptroller-General,” *Tenn. Law Rev.*, XV, 265-279 (June, 1938).

be headed by an auditor-general.¹ Sharply opposed views developed, however, in various responsible quarters; and the suggested changes have not been made. Meanwhile, President Roosevelt's opportunity to select a comptroller-general of more sympathetic disposition has eased the situation.

The Growth of National Expenditures

In the first decade of the present century, the national government rarely spent as much as half a billion dollars a year; indeed, the Fifty-first Congress (1889-91), in its day, achieved notoriety as the first to appropriate over a billion during its biennium. From that modest level, national expenditures have vaulted to proportions staggering the imagination. By the beginning of the Roosevelt period (1933), they had risen to nearly four billions a year, and three years of New Deal effort to overcome the depression pushed them up to above nine billions. Some improvement in the national situation permitted a drop to about eight billions in 1937. But an economic recession in that year, combined with growing outlays for national defense, carried the figure for the fiscal year ending June 30, 1941, to \$12,710,000,000, exclusive of debt-retirement payments. Within the first six months of the following fiscal year, the fast-expanding defense effort merged into war effort on the most extended scale ever known to the country; and the total outlay for that year (1942) reached the astonishing figure of \$32,396,000,000. Even this, however, was merely a prelude to greater outlays later on: in fiscal 1943, they rose to seventy-eight billions (almost double the total national income in the depression year 1932), and in 1944 to almost ninety-five billions; while for fiscal 1945 the estimate was a round hundred billions. Nothing like this could have been envisaged by any one a generation ago.

Some astonishing figures

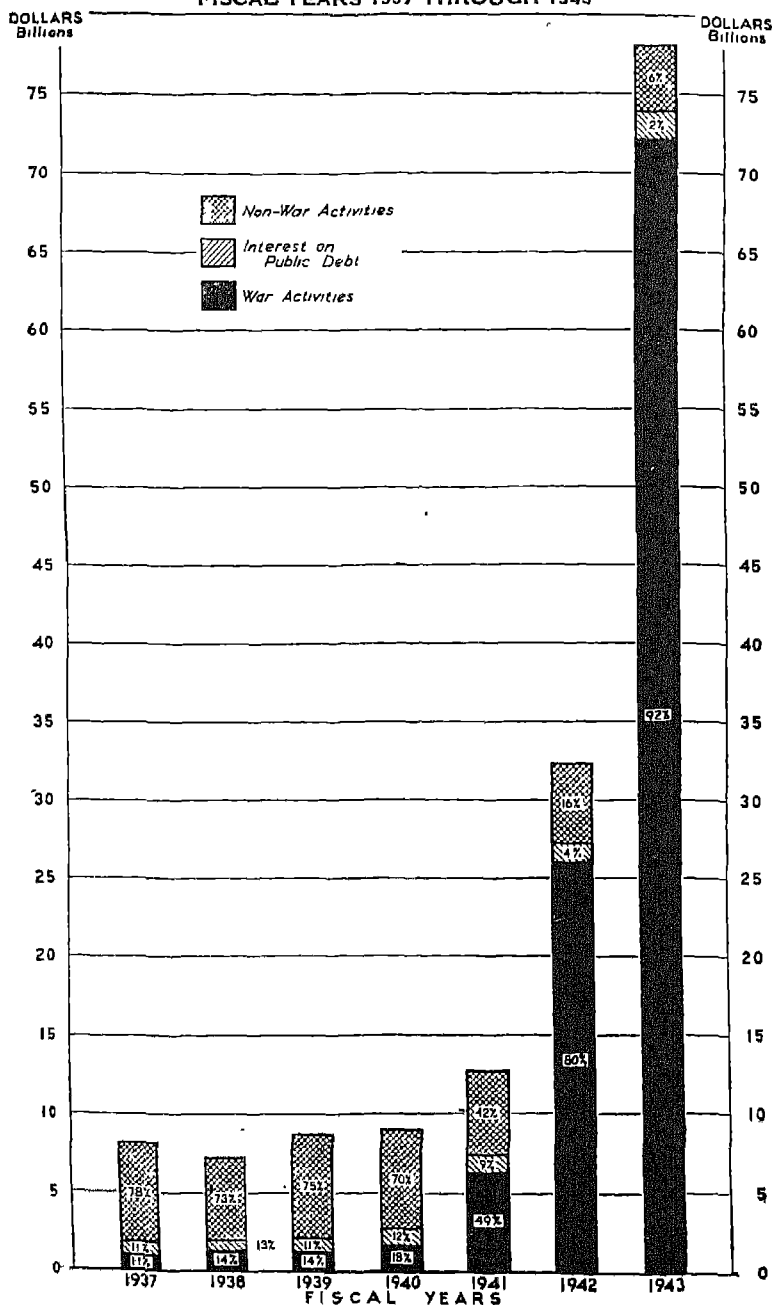
After the first World War, the country settled down to a more or less normal peacetime expenditure pattern, with outlays devoted mainly to interest on and retirement of the national debt, veterans' pensions, costs of the executive, legislative, and judicial establishments, support of the Army and Navy, and the carrying on of relatively modest enterprises in such domains as reclamation, river and harbor improvement, and highway construction. Since 1933, however, this pattern has been warped almost beyond recognition—first, by the injection of newer types of expenditure (work relief, aid to agriculture, assistance to youth, social security, and what not) entailed by the efforts of the New Deal to lead

The depression and the war as contributing factors

¹ The Committee's discussion of the subject will be found in its report, *Administrative Management in the Government of the United States*, 20-24. Later on, the Brookings Institution submitted a report to a Senate committee on government reorganization which in some respects opposed the recommendations of the President's Committee. See *Report to the [Senate] Select Committee to Investigate the Executive Agencies of the Government* (Washington, 1937), No. 5, pp. 79-102. Cf. J. McDiarmid, "Reorganization of the General Accounting Office," *Amer. Polit. Sci. Rev.*, XXXI, 508-516 (June, 1937); also D. T. Selko, *The Administration of Federal Finances* (Washington, 1937), in which the President's Committee and the Brookings views are compared, to the advantage of the latter.

EXPENDITURES,¹ CLASSIFIED BY MAJOR FUNCTIONS

FISCAL YEARS 1937 THROUGH 1943



NOTE.—Expenditures for non-war activities shown in this chart include some outlays which had the furtherance of defense or of the war effort as an objective. The expenditures for such activities were made from general appropriations and could not accordingly be classified as part of the war program.

From the *Annual Report of the Secretary of the Treasury* (1943)

¹ Excludes statutory debt retirements and trust account expenditures.

the country out of depression and to inaugurate a permanently improved social and economic order; and afterwards, in far greater degree, by outlays incident to the national defense program launched in 1940, and especially to the present war. In the year ending June 30, 1941, for example, nearly a billion dollars went for aid to agriculture and more than one and one-quarter billions for work relief; and although the items mentioned have been brought down to lower levels, the over-all and permanent growth of ordinary peacetime expenditure is indicated by the fact that in 1942 President Roosevelt expected the national outlay after the war—even with the most careful economy while the staggering national debt was in process of liquidation—to amount to not less than ten billions.¹

But of course it is the defense effort and the war that have led to expenditures dwarfing all others. During the year ending June 30, 1940, eighteen per cent of the total national outlay went for defense; in the following year, forty-nine per cent; in the next one, eighty per cent; and in 1943, ninety-two per cent. In asking Congress, in June, 1942, for a 1943 war grant of \$39,400,000,000, the President made by far the greatest single appropriation request known to our history—the sum being larger than the entire cost of our participation in the first World War, and more than ten times the total outlay of the national government in 1929. Yet even this figure was dwarfed by a request seven months later for an even hundred billions for war-spending during the ensuing fiscal year. What the total cost of the defense and war effort will finally be, in terms merely of actual current expenditure, no man can say. But it is significant that appropriations, contract authorizations, and government-corporation commitments from June, 1940, through December, 1943, alone aggregated 334 billions—more than all the money spent by the national government from the inauguration of George Washington to the attack on Pearl Harbor.²

Probably most people who saw in newspaper headlines the mounting figures of expenditure during the past several years were merely benumbed by them, or at the most were led to wonder vaguely how such sums could ever be raised. There were those, however, who called loudly for reductions in non-defense outlays calculated, to some appreciable extent, to offset the increases regarded as imperative. Early in 1941, Congress took note of the demand by setting up a joint committee on "non-essential" expenditures; and near the end of the year this committee,

Cutting
non-de-
fense
expendi-
tures

¹ How completely out of line this figure is with postwar certainties as we now can see them is indicated by current estimates that interest on the national debt alone will run to six billions or more and military expenditure to the same amount or above. Expert opinion in 1944 was that the postwar budget will not be under twenty-four billions. See R. G. Blakey, "Postwar Tax Problems," *State Government*, XVII, 422-423 ff. (Oct., 1944).

² See the President's budget summation, July 31, 1943, and budget message, January 13, 1944, in *N. Y. Times*, Aug. 1, 1943, Jan. 14, 1944. On the cost of the earlier defense program alone, see A. G. Beuhler [ed.], "Billions for Defense," *Annals of Amer. Acad. of Polit. and Soc. Sci.*, CCXIV, 1-215 (Mar., 1941).

with Senator Byrd of Virginia as chairman, recommended slashes on non-defense activities aggregating upwards of two billion dollars.¹ The Budget Bureau, too, prepared tables showing where cuts of one, one and one-half, and even two billions could be made; and the budget for 1943, as submitted by the president in January, 1942, provided for reductions at certain points totalling at least a billion. The difficulty was, however, that no one could figure out such saving without cutting deeply into great undertakings like agricultural aid, public works, pensions, and social security; and to every proposal of the kind sturdy opposition was certain to be offered by vast numbers of people with interests at stake. The upshot has been that, while some significant cuts have been made, the economies thus far effected constitute hardly more than a drop in the bucket. The effort continues; but too much must not be expected from it. The government itself, indeed, still hopes to be able to lead the nation to victory abroad without material sacrifice of hard-won social and economic gains at home.²

Borrowing Money—The National Debt

The
method
of bor-
rowing

When expenditures and revenues are approximately equal, the government is said to have a "balanced" budget. If, on the other hand, expenditures exceed receipts, there is a deficit, and the budget is said to be out of balance. In ordinary times, and for ordinary undertakings, the income derived from taxation, supplemented by receipts from other sources, has usually been sufficient to meet the government's needs. In time of war, however, or other unusual strain, such as a period of business depression, or to meet the cost of some great public work like the Panama Canal, the government is obliged to resort to borrowing; and the accumulated obligations thus incurred give rise to the national debt. Congress may borrow from any lenders, for any purposes, in any amounts, on any terms, and with or without provision for repayment of the loans, with or without interest.³ The method of borrowing is commonly that

¹ The saving was to be effected by abolition of the Civilian Conservation Corps, the Farm Security Administration, the Farm Tenant program, and the peacetime activities of the N.Y.A., a large reduction in appropriations to the W.P.A., and reduced expenditures for public buildings and roads, rivers and harbors, and flood control programs. A sharp dissenting report was filed by a minority of the joint committee. Cf. H. P. Seidemann, *Curtailment of Non-Defense Expenditures* (Washington, D. C., 1941).

² The chief "non-war" expenditures for fiscal 1944 were \$725 millions for veterans' pensions and benefits, \$765 millions for aids to agriculture, \$951 millions for social security and retirement funds, \$377 millions for public works, and over a billion for maintenance of the general government. Budget message, Jan. 9, 1945 (*N. Y. Times*, Jan. 10, 1945).

³ The power to borrow money is expressly granted to Congress in the constitution, being indeed one of the very few powers conferred absolutely without restriction (Art. I, § 8, cl. 2). The United States operates under no *constitutional* debt limit, such as is fixed for many of the states in their constitutions, and such as states commonly establish for counties and cities. For some time, however, a federal debt limit has been maintained by act of Congress, the figure being raised by stages since 1934 until by act approved June 9, 1944, it reached 260 billions and by further legislation in March, 1945, was pushed up to 300 billions.

of selling securities—usually in the form of interest-bearing long-term bonds or short-term treasury notes or certificates—to banks, insurance companies, and individuals as voluntary purchasers; and such securities rate high in the money markets, not only because, when issued in times of stress, they usually pay attractive interest, but because the national government (unlike some of the states) has never repudiated a debt.¹ If, however, the investment motive, reinforced by patriotic appeals and high-pressure salesmanship, fails, in time of emergency like the present, to bring about voluntary purchases in sufficient amounts, the government may compel purchases by “deferred-savings” devices of one kind or another.

In the past twenty-five years, the United States has been added to the long list of countries staggering under the burden of a huge national debt. In 1916, we were paying interest, as a nation, on less than a billion dollars.² Three years of war-financing—in the course of which upwards of twenty billion dollars’ worth of Liberty and Victory bonds were disposed of to literally millions of purchasers—raised the figure to above twenty-five billions. Peace restored, extensive borrowing ceased; and in a period of what was looked upon as unparalleled “prosperity,” national revenues, notwithstanding lowered tax rates, exceeded national expenditures year after year, permitting substantial debt retirement. By the end of 1930, we owed only a trifle over sixteen billions. With a little more sacrifice during lush days, the whole of this might have been liquidated; and, as we are situated now, it is a pity that we did not put forth the effort.

Already, however, at the date mentioned, the effects of the economic depression were being felt widely, both by governments and by private persons and corporations. Revenues fell off sharply; outlays for relief and related purposes mounted to new heights; under a policy of “borrowing itself into prosperity,” the country went on from a national debt of twenty-nine billions in 1935 to one of forty-two billions on June 30, 1940, when for the twelfth successive time the federal government closed a fiscal year with a formidable deficit.³ In one way or another, the borrowing power was employed to authorize the issuance of government,

The national debt since 1916:

1. After the first World War

2. During the depression

¹ When conditions become more favorable, the government is not unlikely, however, to refund a loan, *i.e.*, to retire it and substitute another at lower interest rates. Commercial interest rates have been prevailingly low in the past decade, and the government has been fortunate enough in the present war period to be able to borrow at rates distinctly below those that it had to pay in World War I.

² This, of course, takes no account of the debts of states and their subdivisions.

³ Only once before (immediately before and during the Civil War) had the government ever gone for any comparable period—eight years in that case—with an unbalanced budget. It is only fair to recognize that considerable amounts have been paid out in loans to states, counties, cities, and private businesses under arrangements supposed to guarantee that in time they will be recovered. Actual collections may, however, never be made in full; and in any event the burden of interest on the sums borrowed for the purpose is heavy. Since 1940, deficits have risen steadily, until for 1944 the amount was almost fifty billions and for 1945 it was estimated at fifty-three billions.

or government-guaranteed, bonds (1) in order to supply liquid capital in place of the frozen assets of commercial banks, insurance companies, building and loan associations, and railroads; (2) to finance a vast series of public works, not only under the national government, but by the states, counties, and cities as well, *e.g.*, public buildings, bridges, highways, city slum-removal, the Tennessee Valley development—all with a view to increasing employment and stimulating business generally; (3) to meet the special needs of the agricultural regions by providing a system of farm credit agencies, making direct loans to farmers, and refinancing farm mortgages;¹ (4) for the relief of home-owners unable to meet mortgage payments, and to encourage home construction and renovation;² and (5) to obtain emergency funds for direct government assistance to the needy and destitute, and to aid the states in similar relief work.

8. Dur-
ing
World
War II

But worse was yet to come. In the autumn of 1939, war broke out in Europe, accompanied by threatening developments in the Far East; and for two years each succeeding month brought the conflict nearer to our own shores—until, finally, in December, 1941, we found ourselves actually at war with the three principal totalitarian states. Regardless of deficits, therefore, the country was compelled to tighten its belt and undertake, first, a *defense* program on land and sea and in the air which alone would have removed all possibility of a balanced national budget for many years to come, and afterwards a *war* effort whose cost and resulting liabilities have been mounting to as yet unpredictable heights. Notwithstanding the increased taxation to be described in the ensuing chapter, the national deficit for the year ending June 30, 1941, soared to \$5,103,000,000, and the gross national debt to \$48,961,000,000—an increase of nearly six billion dollars in a single year. And that was while we were still at peace. Within two months after Pearl Harbor, the sixty-billion mark was passed; on December 1, 1942,—with the country at war only a year—the figure was close to one hundred billions; by June 30, 1943, it topped \$140,000,000,000; in December, 1944, it stood at \$231,000,000,000; and with the end of the war not definitely in sight, either in Europe or in the Far East, the Budget Bureau's prediction of a debt of \$258,000,000,000 by June, 1945, entailing an annual interest charge of upwards of five billions, seemed likely to be fulfilled.

What of
the
future?

Is this extraordinary situation in which the country finds itself a cause for alarm? Many persons think so, believing that a debt of such proportions cannot prove other than a dead weight from which our people will long suffer retardation. Others view it less apprehensively, believing that if the national income continues at a high level after the war the burden can be carried without serious interference with our *standard of living* or continued progress. In the first place, however, there can be no

¹ See pp. 578-580 below.

² See pp. 523-524 below.

guarantee of a future high national income over an indefinite period of years.¹ In the second place, the contention of some that the debt is not serious because we owe it to ourselves is fallacious; for while undoubtedly it is better that we owe it to ourselves than to foreign lenders, this will not prevent the burden from falling very unequally and disproportionately upon our people. About the only consolation that the situation offers is the fact that, whereas in World War I the government had to borrow at interest rates of four to four and one-half per cent, in the present war the rates have averaged only about two per cent. Several things might, of course, in future be done about the debt. We might simply repudiate it, as the Soviet government repudiated the old Tsarist national debt in Russia. But that is not the American way (even though the debt of the Confederate States was thus disposed of). We might go into default on it, *i.e.*, simply not pay the interest on it to the bondholders and others who own the government's securities. But this would be totally out of line with all previous national policy (even though there has been a good deal of defaulting on municipal and other local debts). We might "monetize" it, *i.e.*, convert bonds into money, which would terminate interest obligations. We might simply "maintain" it, paying interest scrupulously, but not making much effort to reduce the principal—a procedure by no means uncommon in European countries. Or, finally, we might do the thing that doubtless most people assume that we are going to do, *i.e.*, maintain the debt and whittle it down as we can in periods when economic conditions are favorable. Without much doubt, this last course is the one upon which we shall start. Where we shall end, no man can say. Certainly, with a multitude of heavy new or continuing postwar expenditures looming ahead, there can be little expectation of sharp reduction in any brief period of time.²

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CHAPTER XXV

NATIONAL REVENUES—THE TAX SYSTEM

The Federal Taxing Power

Although the national government receives no small amount of revenue from other sources, *e.g.*, operation of the postal system and the mints, fees from patents and copyrights, fees and fines imposed in the courts, and sales of property, the money with which to meet ordinary expenditures as well as huge outlays on public works, national defense, and war can come from only two main sources, *i.e.*, taxation and borrowing.¹ The latter has been commented on in the preceding chapter; our subject here is taxes. A major difference between the government under the Articles of Confederation and that under our present constitution is that, whereas the former could raise money only by levying requisitions upon more or less uncoöperative states, the latter can reach down past the state governments to the individual citizen, place a money charge on his property or business or income, and enforce payment, if necessary, by seizing and selling his possessions in case of delinquency—a power manifestly of tremendous significance, opening the way as it does for burdens to be laid upon one class of people for the benefit of another (if Congress is so disposed) and for other actions affecting the distribution and use of wealth. Very appropriately, the long list of powers given Congress in the eighth section of the first article of the constitution starts off with the power “to lay and collect taxes, duties, imposts, and excises.”²

The taxing clause of the constitution

Comprehensive, however, as is the taxing power thus conferred, it can be exercised only in accordance with certain express or implied restrictions. To begin with, Congress is not free to lay and collect taxes for any and all purposes, but only (as the constitution plainly says), “to pay the debts and provide for the common defense and general welfare of the United States.” The first two purposes indicated are definite

Restrictions on the taxing power.

1. Purposes

¹ Out of a total national revenue of \$8,282,062,000 in the last pre-war year (the fiscal year ending June 30, 1941), \$463,697,000, or less than five per cent, accrued from non-tax sources. Borrowed money is not, of course, included in “revenue.”

² As employed in this clause, the term “taxes” means primarily *direct* taxes, assessed upon and paid directly by those liable to them, *e.g.*, landowners; “duties” and “imposts” relate to levies on imports or exports or both (what we commonly call tariffs or customs); and “excises”—a term of English origin—denotes what is usually referred to as “internal revenue,” *i.e.*, levies upon the production, distribution, or use of commodities within the country. The general term “taxes” is, however, commonly employed for all three categories; and in contrast with the first, *i.e.*, *direct* taxes, the others are said to be *indirect*, for the reason that, although collected in the first instance from importers, manufacturers, distributors, and the like, they are practically certain to be passed on to the consumer in the form of higher prices for goods, with the result that it is he who really pays the tax, even though without much realization, that he is doing so.

enough. But the term "general welfare" is so broad that as a restriction upon the taxing power and the incidental power to appropriate, it has been of no very great importance. Congress thus has a great deal of latitude; and by virtue thereof, that body is found promoting the "general welfare" by imposing taxes the proceeds of which are to be appropriated for the aid of institutions of higher learning, although they are attended by only a comparatively small part of the population; for the relief of unemployment, mortgaged homes, banks with frozen assets, and drought-stricken areas; for the construction of the Panama Canal, power plants at Boulder Dam, Muscle Shoals, and Grand Coulee, irrigation projects, and other "public works"; for aiding the states in the construction of highways; and for promoting rural electrification and resettlement.

Nevertheless, national taxes may not be levied and the proceeds spent for simply anything that Congress may choose to regard as in the interest of the general welfare. For example, the power to tax—the Supreme Court has said—may not be employed by Congress to draw to itself controls which under the constitution are not vested in the national government, but on the contrary are left to the states. In other words, the "general welfare" that may be aimed at through exercise of the taxing and appropriating power must fall within the boundaries marked out for the federal government by the constitution, as that instrument is interpreted by the Supreme Court.¹

2. Uniformity of indirect taxes

Down to World War I, the greatest part of the national revenue always came from indirect taxes; and, as we shall see, a very large share is still derived from this source. In laying taxes of this kind, Congress is bound by the constitutional provision that "all duties, imposts, and excises shall be uniform throughout the United States."² The injunction does not prevent tobacco excises, for example, from falling more heavily upon sections where tobacco products are manufactured extensively than upon others where there is little industry of the kind; it means merely that all cigars or cigarettes of a given kind or condition shall be taxed at the same rate in all parts of the country. Formerly, the clause meant also that duties on imports must be uniform at all ports of entry. Under Supreme Court decisions since 1901, however, rates on commodities coming from the insular dependencies may differ from those on imports from other areas;³ and under the trade agreement system instituted in

¹ As recently as 1936 an "unregenerate" Supreme Court held that processing taxes levied under the Agricultural Adjustment Act of 1933 to raise revenue with which to compensate farmers for reducing their crop acreage was unconstitutional, however desirable the objective (*United States v. Butler*, 297 U.S. 1). As now constituted, the Court is prepared to sanction a considerably broader construction of the welfare clause. But at all events, any federal tax for "welfare" purposes must still fall within such boundaries—marked out for the federal government by the constitution—as the Court will recognize. R. L. Post, "The Constitutionality of Spending for the General Welfare," *Va. Law Rev.*, XXII, 1-39 (Nov., 1935); E. S. Corwin, "The Spending Power of Congress," *Harvard Law Rev.*, XXXVI, 548-582 (Mar., 1923).

² Art. I, § 8, cl. 1.

³ *De Lima v. Bidwell*, 182 U. S. 1 (1901); and for a recent decision, *Cincinnati Soap Co. v. United States*, 301 U. S. 308 (1937).

the last decade,¹ there may now be further variation, according to the foreign country from which the commodities come.

The taxing power is further limited (1) by a constitutional provision forbidding the laying of duties on exports,² although Congress is authorized to regulate export trade in every way other than by taxation; and (2) by the requirement that direct taxes shall be apportioned among the several states according to population.³ As interpreted in earlier days—to include only poll or capitation taxes and taxes on real estate (and at one time slaves)—direct taxes have been laid by Congress only five times in our history, most recently in 1861. Taxes on incomes laid in 1862 were held by the Supreme Court not to be direct taxes. When, however, a new income tax law was challenged judicially in the last decade of the century, the Court took a contrary stand;⁴ and finally, as we have seen, the practical difficulty of collecting such taxes on any basis of apportionment among the states led in 1913 to adoption of the Sixteenth Amendment, brushing aside the entire question of whether income taxes are or are not direct taxes, and simply authorizing Congress to "lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states."

3. Other express restrictions

Finally may be mentioned (1) the implied restraint of Congress (arising from the nature of the federal union) from taxing the property or essential functions of state governments or of subordinate governments created by them, and (2) the similarly implied restriction upon taxing securities issued by such jurisdictions or incomes derived therefrom.⁵

4. Implied restriction

Except as restricted in the foregoing ways, Congress is free to tax any and all objects and persons within the national jurisdiction, to make the rates as steep as it likes (even to the point of confiscation), and in this way to raise any amounts of revenue desired or deemed feasible. If the people think themselves taxed excessively or unfairly, they will find remedy (as the Supreme Court has itself said), not in the courts, but

Wide sweep of the taxing power

¹ See pp. 510-511 below.

² Art. I, § 9, cl. 5.

³ Art. I, § 2, cl. 3. C. J. Bullock, "The Origin, Purpose, and Effect of the Direct-Tax Clause in the Federal Constitution," *Polit. Sci. Quar.*, XV, 217-239, 452-484 (Sept., June, 1900).

⁴ *Pollock v. Farmers' Loan and Trust Co.*, 158 U. S. 601 (1895).

⁵ But see pp. 80-81 above concerning the taxation of salaries. Until fairly recently, the federal government did not uniformly tax even its own instrumentalities—although not because of constitutional restraints. Thus the income from most federal bonds and other securities was exempt from "normal" taxation (although not from surtaxes) until February, 1941, when a bill was signed by the president giving the secretary of the treasury discretionary authority to sell securities subject to normal income taxes as well as to surtaxes; and without delay the secretary announced that future issues of federal securities would not enjoy even the previous degree of exemption. Contrary to earlier usage, too, all federal officers are now subject to national income taxes on their salaries. Formerly, the president was regarded as exempt; but an act taking effect in 1932 made him liable, and Franklin D. Roosevelt became the first to be affected. Formerly, too, federal judges—guaranteed in the constitution against diminution of their salaries while in office—were considered exempt; and in *Evans v. Gore* (253 U. S. 245, 1920) the Supreme Court so ruled. The act just mentioned, however, made all federal judges "taking office after June 6, 1932" liable; and in 1939 all others were included.

in electing a Congress disposed to reduce or reapportion taxes. Most laws imposing taxation can readily be classed as revenue laws, *i.e.*, laws in which the primary, if not sole, purpose is to produce income for the government. There are, however, measures which—although tax laws in form—aim only incidentally at bringing in revenue; thus, tariff schedules designed to protect American industries against foreign competition have often carried rates too high to be productive. Indeed, Congress has at times gone so far as to impose taxes with the avowed purpose of destroying a business activity, such as the issuing of bank notes by state banks; and measures of this nature have been sustained on the ground that Congress has full right to impose taxes not merely to raise money but also as a means of regulating commerce or currency, or rendering effective some other expressly granted power.¹

The
taxing
power
and
social
reform

Is a tax constitutional, however, when it is not clearly either a revenue measure or a device for rendering effective some other delegated power, but rather is aimed solely, or principally, at promoting the "general welfare" of which we have spoken? This question was raised pointedly by a law of 1902 laying a prohibitive tax on oleomargarine, by an act of 1912 placing a similar tax on the manufacture of poisonous phosphorus matches, by narcotic drug laws of 1914 and 1919 imposing a tax on registered dealers, and by an act of 1919 laying a special tax on the incomes of concerns employing children under the age of sixteen, the sole purpose being to discourage the use of child labor. In cases coming before it at different times, the Supreme Court upheld both the oleomargarine and the narcotics law as revenue measures, refusing to inquire into the legislative intent.² The constitutionality of the phosphorus match law has never been judicially tested. But when the child labor law was challenged, the Court fixed attention on the motive animating Congress, and held that the measure was not a valid exercise of the taxing power.³ For similar reasons, it invalidated the processing taxes levied under the first Agricultural Adjustment Act (1933) and a tax on producers of bituminous coal (1935), on the ground that the former were for the purpose of regulating agricultural production and the latter only a penalty for non-compliance with regulations affecting the business of coal-mining, neither of which fields was then regarded by the Court as within the bounds of congressional control.⁴ As previously indicated, however, a Court now oriented to more liberal viewpoints has shown greater tolerance in such matters; and the presumption is that to the

¹ *Veazie Bank v. Fenno*, 8 Wallace 553 (1869).

² *McCray v. United States*, 195 U. S. 27 (1904); *United States v. Doremus*, 249 U. S. 86 (1919); *Nigro v. United States*, 276 U. S. 332 (1928). See also *Amer. Polit. Sci. Rev.*, XXIII, 78-81 (Feb., 1929), and W. McCune, "The Oleomargarine Rebellion," *Harper's Mag.*, CLXXXVIII, 16-23 (Dec., 1943).

³ *Bailey v. Drexel Furniture Co.*, 259 U. S. 20 (1922). Cf. R. E. Cushman, "Social and Economic Control Through Taxation," *Minn. Law Rev.*, XVIII, 757-783 (June, 1934).

⁴ *United States v. Butler*, 297 U. S. 1 (1936); *Carter v. Carter Coal Co.*, 298 U. S. 238 (1936).

many occasions on which the federal taxing power has already been used with impunity in advancing social and economic ends, with considerations of revenue wholly secondary, will in future be added still others of major significance. In much of our income and inheritance taxation during recent decades, the purpose to curb "swollen fortunes" can be discerned almost as clearly as that of obtaining revenue; and in messages to Congress in 1935 and on other occasions, President Franklin D. Roosevelt, pushing further ideas advanced by Theodore Roosevelt, Wilson, and even Hoover, warmly advocated such a policy, with a view to more equitable distribution of wealth and economic power.¹

With the federal government and the states taxing the same persons or objects at the same time, there are plenty of chances for double, or even triple, taxation; and in the past thirty-five years—beginning with the federal corporation tax of 1909, the income tax of 1913, and the inheritance and estate tax of 1916—the amount of such multiple taxation has increased enormously. Although the federal government relies for the major part of its tax revenue upon personal and corporation income taxes, estate and inheritance taxes, stock transfer taxes, tobacco and liquor taxes, and gasoline taxes, all of these objects are taxed by some or all of the states as well.² Indeed, apart from the general property tax, there are few major forms of taxation to which the national and state governments do not both lay claim, each without much regard to the other or to the taxpayer; and often the sums collected by the national government within a state from a given tax exceed the amounts collected from that tax by the state itself. The resulting handicaps to business and industry—to say nothing of the burden for individuals—have stirred endless discussion and protest. In a period, however, when most taxing authorities are of necessity bent upon getting as much as they can, the problem remains largely unsolved.³

The
problem
of multi-
ple tax-
ation

¹ The President's proposals revived discussion of the old question of the scope of the national taxing power. Opponents of increased corporation, inheritance, and estate taxes insisted that the proper purpose of taxation is to raise revenue, and not to promote economic and social ends, and that a tax levied with the latter objective would be a perversion of the taxing power, which, if allowed to become a precedent, would enable Congress arbitrarily to place limits upon individual and corporation earnings, the transmission of wealth, and the size of business organizations. See C. T. Crowell, "Taxation Not for Revenue," *Harper's Mag.*, CLXXV, 89-95 (Dec., 1937). The whole subject of the concentration of wealth and of economic power was freshly studied by a Temporary National Economic Committee, reporting in 1940 (see p. 553 below). It may be observed that the extremely high income, inheritance, and estate taxes incident to the present war will, if long continued (as in some degree the accumulated national debt will certainly require), have much of the levelling effect desired by President Roosevelt.

² In 1933, a sub-committee of the House ways and means committee reported 323 cases in which the same group of taxable objects was taxed by federal and state governments. Cf. *Report of a Sub-Committee of the Committee on Ways and Means Relative to Federal and State Taxation and Duplication Therein* (Washington, 1933). Two years later, 800 such instances were counted. F. G. Crawford, "Taxes Talk," *The Tax Digest*, XIV, 257 (Aug., 1936).

³ In February, 1933, an interstate commission on conflicting taxation was set up by the Interstate Legislative Assembly of the American Legislators' Association, and in 1935 it published at Chicago, a volume entitled *Conflicting Taxation*.

*The Pattern of Federal Taxation*Trends
since
early
times

As indicated above, the federal government early began relying principally upon indirect taxation, chiefly duties on imports; and so completely were the country's tax needs met from this source that until the Civil War direct taxes were brought into play only four times and excise taxes only in the two periods 1791-1802 and 1813-18. The exigencies of the conflict between the states, however, not only forced a temporary reversion to direct taxation, but brought excise taxes again into use; and from that time onwards the latter always formed part of the federal tax picture—although with tariff duties (designed to protect the country's industries as well as to yield revenue) still dominant. Sometimes the argument was heard that people would be more tax-conscious, and therefore more concerned about economy and efficiency in government, if taxation were less disguised. But politicians found it convenient to keep tax burdens more or less hidden, and the indirect pattern was consistently adhered to. Only toward the end of the century did new currents of social and economic opinion bring to the surface concepts of a radically altered tax pattern—one in which, while older taxes should not be wholly discarded, an important (and perhaps eventually the primary) place should be assigned to a tax based upon ability to pay as measured in terms of individual and corporate incomes; and, constitutionally validated by the Sixteenth Amendment, the new form of levy established itself firmly in our system (1913) shortly before we became involved in World War I.¹ One of the advantages of income taxation is its flexibility—the ease with which, by juggling a few rates and brackets, it can be made to yield vastly more or vastly less as may be desired; and under the impact of unparalleled wartime expenditures in 1917-18 the national revenue from this source was pushed to topmost place—a position which it consistently maintained until 1933. Even in the memorable depression year 1932, more than half of the government's tax revenue was obtained in this way. Prolongation and intensification of depression conditions, however, eventually cut personal and corporate income to a point where the taxes upon it yielded sharply diminishing sums; and once more the bulk of national revenue began to come from customs duties

In recent years, much formal and informal coöperation between federal and state tax-collecting officials, especially in the fields of income, estate, and alcoholic beverage taxes, has tended to minimize administrative conflicts arising from multiple taxation. See J. W. Martin, "The Problems of Duplicating Federal and State Taxes," *State Government*, XVII, 287-289 (Mar., 1944); "Functions of Intergovernmental Administrative Coöperation in Taxation," *ibid.*, XVII, 327-332 (May, 1944); and "Federal-State Tax Coöperation," *Nat. Munic. Rev.*, XXXIV, 21-26 (Jan., 1945).

¹ There had, of course, been some earlier experience with federal income taxes. A wartime tax of the kind, laid in 1861, lasted, in one form or another, until 1872; a tax of the sort imposed in 1894, with a view to compensating for loss of revenue caused by reduction of tariff rates, was in the following year pronounced unconstitutional (*Pollock v. Farmers' Loan and Trust Co.*, 157 U. S. 429); and a tax laid in 1909 on the income of corporations was to all intents and purposes an income tax, although evasively termed an *excise* tax on the privilege of doing business.

and excises, even though here, too, yields were reduced by languishing commerce and slackened business. Some measure of prosperity having been regained, the income tax stream began rising again in 1937; and, propelled by the hectic tax policies of the ensuing war period, it became a veritable torrent, completely dwarfing all other tax sources.

In the fiscal year ending June 30, 1941—a period of rapidly mounting defense expenditure, and the last year before the country became involved in World War II—the revenue received by the national government from all sources amounted to a little over seven and one-half billion dollars. Within three years, the total rose (in the year ending June 30, 1944) to more than forty-four billions—until then, at least, the largest income in the government's history.¹ And of this sum, only 907 million dollars came from non-tax sources; more than 43.5 billions came from taxes.

The principal tax sources, with yields, in 1944 were as follows:

Towering above all others were personal and corporation income taxes—the former yielding over twenty billion dollars and the latter more than fifteen billions, an aggregate of nearly thirty-five and one-half billions, or almost seventy-nine per cent of the total tax receipts. In the taxation of yearly incomes of individuals, the following main features appear;² (1) complete exemption of all income below a figure (\$500) supposed to represent the minimum requisite of a bare existence, and somewhat larger (\$1,000) in the case of married persons; (2) additional modest amounts of income exempted, or “deductible,” for children or other dependents (\$350 for each); (3) a relatively low fixed rate of tax—the “normal” tax of three per cent—on all net taxable income; and (4) starting at a fixed level of net income, and rising rapidly from bracket to bracket, a surtax, which in the case of larger incomes becomes by far the principal burden. Non-profit organizations, *e.g.*, churches, colleges, lodges, coöperative associations, and labor unions, are exempt; and corporations and other organizations for profit have their own system of exemptions, normal taxes, surtaxes, and the like, capped by an “excess-profits” tax rising by stages to a point where ninety-five per cent of such profits go to the government. Lowering the personal exemptions to the figures indicated above for single and married persons in 1943 brought millions of people for the first time within the ranks of federal income-tax payers, presumably diffusing tax-consciousness more widely than ever before;³ although the tax (amounting to twenty per cent of wages) is, for a very large proportion of these people, figured by the employer and paid by him after being “withheld” from wages due. Under a “pay-

The
pattern
today

1 Income
taxes

¹ The Budget Bureau's estimate for fiscal 1945 was nearly forty-six billions. Budget message, Jan. 9, 1945.

² Changes in detail are made from year to year, but the general plan is fairly stable.

³ As recently as 1941, only about seventeen million persons made federal income tax returns; in 1944, the number was not far from fifty millions.

as-you-go" system (the familiar "Ruml Plan") adopted in June, 1943, the tax, in the case of other people, is payable in quarterly instalments starting March 15 of the tax year (not in the following year, as formerly). Salaried persons find twenty per cent deducted from their pay checks, the contribution thus credited figuring (as in the case of wage-earners) in the final reckoning which determines whether a person still owes something or perchance is entitled to a rebate.¹

2. Estate
and gift
taxes

On a number of occasions from the Civil War onwards, the federal government imposed some form of tax on estates of deceased persons or on inheritances of portions thereof, and since 1916 an estate tax has been a regular feature of the federal tax pattern. Formerly, exemptions ran as high as \$100,000, and rates in lower brackets were relatively mild, although high in upper ones. Naturally, under wartime taxation, exemptions have been reduced (to \$60,000) and rates stiffened. In order to reach wealth that might escape estate taxation by being given away by the possessor with that end in view, a federal gift tax (on a graduated scale approximately three-fourths as heavy as estate taxation) was introduced in 1924, repealed in 1926, and reintroduced in 1932. Here again, rates have been increased in wartime; and in 1944 estate and gift taxes together yielded \$512,211,000, or somewhat over one per cent of total tax receipts. Combined with "progressive" income taxes, estate and gift taxes operate powerfully in our time to check the growth and transmission of large fortunes, thereby promoting a socially desirable distribution of wealth.

3. Gen-
eral
excise
taxes

Then there are the taxes paid, in some small way, even by people too poor to be reached by the income tax, *i.e.*, the excises falling on tobacco, liquor, motor-fuel, theater-admissions, cosmetics, and scores of other objects, many of them luxury articles to be sure, but including everyday necessities for at least some people. No one needs to be told how greatly the list of articles taxed has been increased, or how sharply rates have been pushed upward, under wartime revenue legislation. The aggregate yield in 1944 was in the neighborhood of three billion dollars.

4. Pay-
roll
taxes

A special form of excise is the tax levied upon employers for the maintenance of unemployment compensation under the federal security program.² This tax is different from others in that, although the federal government levies it, only ten per cent of it is federally collected, the remainder being collected and eventually paid out in benefits by the states. The portion federally collected in 1944 amounted to about a billion and a half.

5. Cus-
toms
duties

Finally comes a form of tax which as recently as 1910 topped all others

¹ Seventeen state legislatures have adopted a resolution calling for an amendment to the national constitution placing a twenty-five per cent limit on federal income tax rates. See H. M. Olmsted, "The Tax Limitation Delusion," *Nat. Mun. Rev.*, XXXIV, 64-68 (Feb., 1945).

² See p. 621 below.

in productiveness, *i.e.*; customs duties. In 1944, the yield of this tax was only 431 millions, continuing the low level reached in wartime because of the inevitable decrease in dutiable imports.¹

The Enactment of Tax Measures—Tariff Legislation

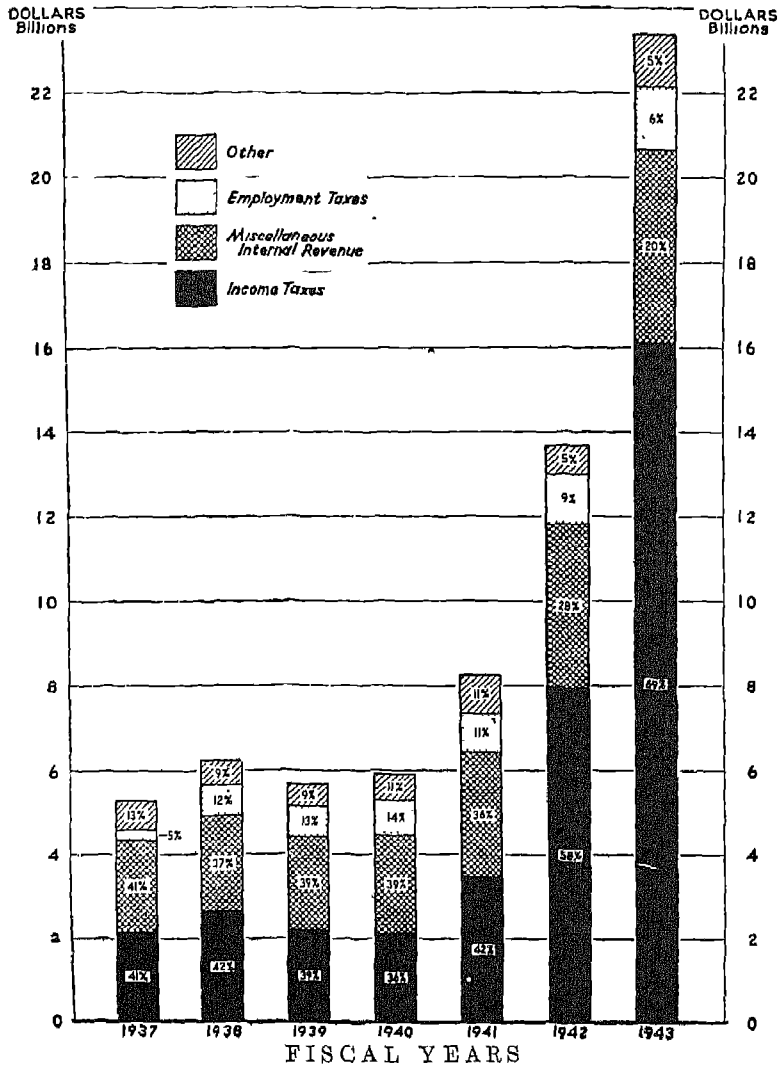
All measures for raising national revenue are required to originate in the House of Representatives. When a presidential budget message is received, such portions of it as relate to revenue are forthwith referred to the ways and means committee of that body; and to this committee it then falls to whip into shape a tax bill, sometimes adhering closely, sometimes less so, to plans and recommendations of the Treasury Department, outlined perhaps in the budget message, but likely to be offered in far greater detail through separate presidential communications. Working for many weeks, through sub-committees when necessary, and with the aid of repeated conferences with the president, budget director, Treasury officials, bankers, business men, and others, the committee finally emerges with a bill which for further weeks absorbs much of the time and energy of the House. Passed by that body, the measure goes to the Senate, where, notwithstanding that the House was originally intended to enjoy genuine primacy in controlling the national purse, most revenue measures are drastically altered, either in the finance committee or on the floor. There is, indeed, nothing to prevent the Senate from amending a House revenue bill by striking out all parts after the enacting clause and inserting an entirely new bill; and something of the sort has happened on several occasions. It is even possible for a bill which in effect, and almost in technical form, is a bill to raise revenue to be passed in the Senate before the House acts on it at all. In any event, a major tax bill, after passing the Senate, will almost certainly have to "go to conference"; and it is commonly in the form in which it comes from conference that the two houses finally enact it and the president signs it.² Throughout the entire procedure, the country—especially the business element—watches with interest, and even anxiety, to see what new taxes will be decided upon, and what increases or other changes will be made in existing ones.

The
handling
of revenue
bills

¹ Throughout discussions of recent federal revenue legislation, a general sales tax, more or less similar to that employed in many states, has frequently been proposed. No such impost has been levied, but it still is not entirely out of the tax picture. See E. R. Nichols and C. Wallis (comps.), *A Federal Sales Tax* (New York, 1942); "Shall Congress Pass a Retail Sales Tax as a Curb on Inflation?" [Symposium], *Cong. Digest*, XXII, 291-320 (Dec., 1943). Such a tax is advocated in C. O. Hardy, *Do We Want a Federal Sales Tax?* (Washington, D. C., 1943). In lieu of a general sales tax, the Treasury Department, in 1942, advocated a "spendings" tax—a levy, at progressive rates, on what people spend for goods and services above a fixed amount. The suggestion, however, was not acted upon.

² The only presidential veto of a general tax bill in the nation's history was President Roosevelt's strongly worded, though unavailing disapproval, February 22, 1944, of a measure providing for hardly more than one-fifth of the additional revenue of ten and one-half billion dollars urgently advocated by the Administration—a bill objectionable to the President also on other grounds. In both houses, the veto was overridden by heavy majorities.

RECEIPTS,¹ CLASSIFIED BY MAJOR SOURCES FISCAL YEARS 1937 THROUGH 1943



¹ Excludes trust account receipts and net appropriation to the federal old-age and survivors' insurance trust fund.

From the *Annual Report of the Secretary of the Treasury* (1943)

From time to time,¹ Congress turns its attention to the enactment of a revenue measure of a type raising special problems and difficulties, *i.e.*, a general tariff law prescribing the duties to be paid on articles imported from foreign countries and also, under varying conditions, from some of the insular dependencies. When new tariff legislation is contemplated, the House ways and means committee commonly assembles in Washington some weeks, even months, before Congress meets, divides itself into sub-committees for the preparation of different portions of the forthcoming bill, and holds public hearings with a view to gathering information. The majority members alone, however, do most of the work, the minority having little opportunity except to sit in at final meetings and hear what has been decided upon. If, however, the minority is inactive, the lobbyists are not. Urging higher rates here and lower ones there, as the interests which they represent may dictate, these assiduous servants of economic and other pressure groups have a veritable field-day whenever a tariff bill is in the making.²

The special case of tariff legislation

The full committee having taken formal action, the resulting bill sometimes is discussed in the majority party caucus (the Underwood Tariff of 1913 was so handled), although normally it goes at once to the House, where in any case it is likely to become the most important subject for debate during the session. Having passed the House, it goes to the Senate, where, indeed, the finance committee may have been doing exploratory work simultaneously with the House committee. On rare occasions, the Senate accepts the House bill with only minor modifications; as a rule, it introduces extensive changes, sometimes practically writing a new bill. At all events, if the differences are weighly, the measure is "sent to conference," where effort is made to work out a reasonable compromise; and the measure that emerges can usually be counted on to be accepted by both houses without further change.

A generation ago, tariff-making solely by act of Congress—never very satisfactory—was found completely inadequate. Responsibility for decisions was too much diffused between the two houses; special interests and their lobbyists exerted too much influence; general tariff bills had become such labyrinths of facts and figures that even the most conscientious congressmen could not inform himself on more than a minor fraction of the provisions on which he was expected to vote. Furthermore, regardless of how well-considered any set of schedules might be when first adopted, fluctuations of prices in the world market might render it

Defects of legislative tariff-making

¹ But henceforth probably less frequently because of the trade agreement system instituted in 1934, and commented on below.

² Since the Civil War, most tariff measures have been called by the names of the chairmen of the committees responsible for them, as the McKinley Act of 1890, the Wilson-Gorman Act of 1894, the Dingley Act of 1897, the Payne-Aldrich Act of 1909, the Underwood Tariff of 1913, the Fordney-McCumber Act of 1922, and the Hawley-Smoot Act of 1930. For an excellent study of pressure-group politics in relation to tariff-making, see E. E. Schattschneider, *Politics, Pressures, and the Tariff* (New York, 1935).

inadequate almost before the ink was dry on the statute. Obviously, the need was not only for tariffs that would be more flexible—capable of quicker adaptation to changing situations—but for tariffs based on more comprehensive, exact, and up-to-date information; and in 1916 a good start toward this was made when a United States Tariff Commission was set up, composed of six members representing both leading parties and charged with continuous investigation of all economic matters bearing upon tariff policy, and with reporting in full to both the president and Congress.

Flexible
tariff
arrange-
ments

By itself, the Commission has never had power to make changes in tariff laws or in their administration; and originally it had authority to accompany the information it imparted with no recommendations except of the most general sort. Tariff acts of 1922 and 1930, however, not only charged it with investigating differences in the cost of production of any domestic article and any like or similar foreign article, but required it to recommend to the president, on the basis of its findings, *specific* increases or decreases in tariff rates; in turn, the president was authorized to change rates, either up or down, within ranges of fifty per cent. In this way arose our earliest "flexible tariff" arrangements, constituting, until 1934, our only means of counterbalancing (without action by Congress) the effects of differentials between costs of production here and abroad.

The
trade
agree-
ment
system
since
1934

More, however, was to come. Tariff revision by the procedure described was still cumbersome; the president could act only on recommendations of the Commission, which, like most such bodies, was prone to move slowly, and whose recommendations were only on specific articles—not embodying a general program. Impressed with the need for seizing every opportunity to promote revival of our then languishing foreign trade, Congress, in 1934, met a request from President Roosevelt by passing a Trade Agreement Act; and the grant, made originally for three years, was renewed for a like period in 1937 and again in 1940, and for two years in 1943.¹ The legislation gives the chief executive large latitude in negotiating reciprocal, or "bargaining," tariff agreements with other countries, without intervention by the Tariff Commission or any other authority. Articles on the dutiable list may not be transferred to the free list, or *vice versa*; no rates may be lowered by more than fifty per cent of the existing rates; and the "most-favored-nation" principle must be preserved. Moreover, before an agreement is concluded with any foreign government, interested parties must be given opportunity to present their views to the president or to such agency as he may designate; and a Committee for Reciprocity Information has been created to serve as such an agency, acting under the jurisdiction and control of the State Department. Within the limits indicated, the president may act freely; and by July, 1942, important agreements of the kind were negotiated with twenty-three different countries. Under wartime conditions, the opera-

tion of the system has been considerably disrupted. Nevertheless, the opinion seems warranted that the principles underlying it offer the only hope for trade revival and prosperity in the postwar era; and it is safe to assume that, in one form or another, they will be maintained. Meanwhile, the Tariff Commission continues to exercise its functions under the flexible tariff provisions with respect to all rates not covered in the trade agreements described.¹

The Treasury Department

The vast volume of fiscal business destined to arise out of the financial powers (especially the power to tax) conferred upon the new government in 1789 was not, of course, foreseen. Nevertheless, one of the first necessities was machinery for the collection of taxes, the care of funds, and the keeping of accounts; and the resulting Treasury Department has developed into a huge administrative establishment, employing more people than the majority of other departments and performing tasks, great and small, of highly varied character.

Foremost among the Department's activities is the collection of the national revenue, chiefly (except for postal receipts) through the Bureau of Customs and the Bureau of Internal Revenue. The former collects the duties on imports provided for by the tariff laws and trade agreements, the work being performed at some three hundred main or subsidiary "ports of entry," located principally on the Pacific and Atlantic coasts, on or near the Canadian and Mexican borders, or in Alaska, Hawaii, Puerto Rico, and the Virgin Islands, and grouped in fifty-one customs collection districts.² Because of the location of its officers at strategic seaboard and land-border ports, the war has imposed upon the Bureau additional responsibility for intercepting and examining tangible communications on vessels, vehicles, and persons arriving from and departing to foreign countries, and for numerous miscellaneous duties having to do with the prevention of sabotage and espionage, and with port-protection. The Bureau of Internal Revenue collects the personal and corporate income taxes, estate and inheritance taxes, capital stock taxes, liquor, tobacco and amusement taxes, and a wide variety of other imposts; and for

Financial
func-
tions.
1. Col-
lection of
revenue

¹ Some opponents of tariff-reduction have contended that the agreements are in reality "treaties," requiring assent in each case by the Senate. Long ago, however, somewhat similar agreements made in pursuance of sections of the tariff acts of 1890, 1922, and 1930 were sustained by the Supreme Court in *Field v. Clark*, 143 U. S. 649 (1892), *Hampton v. United States*, 276 U. S. 394 (1928), and other decisions. In April, 1945, a further extension of the empowering legislation seemed likely.

For general references on executive agreements, see p. 649, note 1, below. On the trade agreement program, see works cited on p. 514 below, and, in addition, S. Welles "Trade Agreements in a New World," *Atlantic Mo.*, CLXXI, 41-44 (Mar., 1943), and H. P. Whidden, "Reciprocal Trade Program and Post-War Reconstruction," *For. Policy Reports*, XIX, No. 2 (Apr. 1, 1943).

² In the interior of the country, there are ports of entry also, where duties are collected on imports shipped under bond. In addition to the collectors, deputy collectors, surveyors, and appraisers employed at all ports of entry, each customs district has a customs patrol, charged with preventing illegal entry of merchandise and with protecting the customs revenues.

this purpose, the country, including Alaska and Hawaii, is divided into sixty-six districts, each in charge of a collector, with the requisite staff of deputy collectors, revenue agents, and other assistants.¹

Formerly, the collection of the national revenues was to a large extent automatic. That is to say, foreign goods could not be imported, and domestic goods subject to taxation could not be manufactured or sold, until the importer, manufacturer, or dealer had paid whatever taxes were due. In the case of importations, cash payments prevailed; in that of excises, the method was mainly that of selling stamps and licenses. Beginning with the corporation tax law of 1909, however, other and sometimes more complicated methods have been introduced, although the customs and ordinary internal taxes continue to be gathered as before. Personal and corporation income taxes, and likewise inheritance taxes, are based upon sworn statements of the tax-paying individual or corporation, and are payable directly and in cash. Manifestly, the statements called for may be evaded or falsified; and with a view to minimizing such abuses, revenue authorities busy themselves the year around with checking up on the returns made. Any statement may be challenged and inquired into if an examiner finds reason to doubt its accuracy or completeness.

2. Custody of funds

A second main function of the Treasury Department is that of keeping the government's money and paying its bills in accordance with appropriations duly made. In the Treasury Building in Washington is a treasury (in the physical sense), in whose vaults large sums are held; and until 1921 there were sub-treasuries in nine other principal cities. Government money has also long been placed in banks; and since the discontinuance of the sub-treasuries most of it is so deposited, principally in the federal reserve banks located in twelve cities carefully chosen with reference to the needs of business.² From such depositories, funds with which to meet the obligations of the United States are drawn by means of checks prepared in the disbursing section of the Treasury and validated by the office of the comptroller-general.³ The custodian of the government's monies, and also of large stocks of gold kept in vaults in Kentucky and Colorado and of silver stored at West Point, is an official known as the treasurer of the United States.

3. Control of the currency

A third important function of the Department is the control of the currency. The Bureau of Engraving and Printing prepares all of the paper money, as well as the bonds and other securities, of the national

¹ Collectors of customs and internal revenue collectors have long been political appointees. The same is true of deputy collectors, who, although at one time selected under merit rules, were by act of 1913 placed outside the classified service. Being subject to senatorial confirmation, all of the officials mentioned fall outside the range of those who, under the Ramspeck Act of 1940, may be included in the classified service by presidential order. The Brookings Institution, in 1941, urged that this situation be corrected by act of Congress; also that both bureaus be transferred from the Treasury Department to the jurisdiction of a bi-partisan commission.

² See p. 519 below.

³ See p. 490 above.

government; the Bureau of the Mint supervises the mints, where the coined money is manufactured, and the assay offices, where precious metals are received, tested, evaluated, and paid for; the Division of Secret Service guards the currency against counterfeiting; and the Comptroller of the Currency supervises the national banks, directs periodic examinations of them, and receives their reports. This latter official also is responsible for the issue and redemption of federal reserve notes and federal reserve bank notes.¹ The national bank notes for whose issue and redemption he was formerly responsible have, however, since 1935 been retired.

One further financial function of the Department is the management of the national debt, concentrated since 1940 in a Bureau of the Public Debt, located in a division known as the Fiscal Service. Once it has been decided by the proper authorities to make a new offering of public debt securities, *e.g.* defense savings bonds, the Bureau prepares the necessary documents, directs the handling of subscriptions and allotments, and plans and issues the securities themselves. It also attends to the retiring of securities, and is responsible for all public-debt accounting and auditing. In June, 1943, a special War Finance Division was established in the Department to stimulate the sale of bonds and other wartime securities.

Early in its history, the Department began to be assigned functions which had little or nothing to do with finance, and until after World War I it served as a dumping ground for offices and activities that Congress did not know how to dispose of otherwise. In recent years, however, such non-financial functions have been gradually reduced by transfers to other departments or agencies, until today the only important units of the kind still included are the Bureau of Narcotics, charged with enforcement of the anti-narcotic laws, and a Procurement Division, which purchases fuel and other supplies for government agencies.²

Management
of the
national
debt

Non-
financial
func-
tions

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¹ See pp. 517-518 below.

² A Legal Division is reckoned as "financial" because practically all of its activities have to do with rendering opinions on financial business, drafting bills relating to such business, etc.; while the United States Secret Service is so considered because of being concerned almost entirely with the prevention and suppression of counterfeiting of United States coins, notes, and bonds—although charged also with protecting the president, his family, and a president-elect from possible injury.

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CHAPTER XXVI

CURRENCY, BANKING, AND CREDIT

The National Currency System

In view of the chaotic monetary conditions prevailing during the Revolution and under the Articles of Confederation, it is not surprising that the framers of the constitution put into that instrument provisions calculated to insure a uniform national currency. On the one hand, Congress was granted authority to "coin money [and] regulate the value thereof";¹ on the other, the states were forbidden to coin money, to emit bills of credit, *i.e.*, paper money, and to make anything but gold and silver coin legal tender in the payment of debts.²

Constitutional provisions

The first law providing for a truly national currency dated from 1792 and, on recommendation of Alexander Hamilton, secretary of the treasury, introduced the now familiar decimal system based upon the dollar as a unit. A second feature may have been wise enough also, although certainly it led to plenty of controversy in later days. This was the arrangement under which the currency was made to consist of coins manufactured from the two precious metals, gold and silver, with fifteen ounces of the latter reckoned as equivalent in value to one ounce of the former.

A currency system established

It was easy enough to say that fifteen ounces of the white metal were equal to one ounce of the yellow, but to keep them actually so was a different matter. For upwards of a hundred years, the effort was persisted in, despite all manner of difficulties flowing from fluctuations of the two metals in the world market. In time, the ratio was changed to sixteen to one; and, this proving only a temporary solution, Congress in 1873 "demonetized" silver altogether—that is, stopped coining the standard silver dollar. Demand for "remonetization," at sixteen to one, grew insistent, and the exciting presidential campaign of 1896 was waged almost exclusively upon this issue. The Democrats, with their sixteen-to-one candidate, William Jennings Bryan, however, lost; and in 1900 the Republicans in Congress placed on the statute-book a "gold standard" act making the gold dollar the unit of value and requiring that the value of all other money be maintained on a parity with gold, so that a silver dollar or a paper dollar might be taken to the Treasury at any time and redeemed in the yellow metal.

The gold standard

¹ Art. I, § 8, cl. 5.

² Art. I, § 10, cl. 1.

The gold
standard
abandoned
(1933)

We now encounter one more striking illustration of the manner in which the great depression of the recent past upset arrangements presumed to be impregnably entrenched. With a view—so it was declared by President Franklin D. Roosevelt and those who shared with him responsibility for what was done—to imparting reasonable inflation to the currency, raising prices, reducing the burden of debts, and thereby contributing to recovery, a swift series of actions were taken which put an entirely new face on our monetary system. First (following executive orders forbidding the exportation of gold except as licensed by the secretary of the treasury, and requiring all holders to turn over their gold coin, or bullion, and gold certificates to the federal reserve banks, receiving in return other kinds of money), the gold standard was formally abandoned, under executive order of April 20, 1933, based on the Emergency Banking Act of the previous March 9, and stopping the free movement of gold in international trade. Second, a joint resolution of Congress, June 5, 1933, canceled the "gold clause," commonly written into long-term bonds and other contracts and calling for the payment of principal and interest in "gold coin of the present weight and fineness." This meant, among other things, that the government's own obligations and those of private persons alike, even though stipulating payment in gold coin, might and would thereafter be payable in any form of legal tender.¹ A third step—criticized in many quarters no less sharply than the foregoing—was the devaluation of the dollar, accomplished by executive order of January 31, 1934, in pursuance of authority conferred in the Agricultural Adjustment Act of the previous year. The purport of the order was to reduce the weight of the gold dollar from 23.22 grains to $15\frac{5}{21}$ grains nine-tenths fine—a reduction of about forty per cent—with the result of giving the country practically a fifty-nine-cent dollar.² Fourth, under the Gold Reserve Act of the same month,³ the government bought all gold remaining in possession of the federal reserve banks, thereby "nationalizing" the entire monetary gold stock of the country, which was thenceforth to be kept in the form of bullion and to serve as a permanent and fixed metallic base for paper currency.⁴ The coinage of gold has been declared at an end. Finally, a Silver Purchase Act of June, 1934, "nationalized" the white metal also by instituting purchases designed to bring it about that the nation's currency should, as a matter of

Other
depression
changes

¹ 48 U. S. Stat. at Large, 112. This action was criticized sharply on both legal and ethical grounds. See R. L. Post and C. H. Willard, "The Power of Congress to Nullify Gold Clauses," *Harvard Law Rev.*, XLVI, 1225-1257 (June, 1933). In February, 1935, the Supreme Court held the resolution unconstitutional in so far as it applied to government bonds (*Perry v. United States*, 294 U. S. 330), although upholding its application to private bonds (*Norman v. B. & O. R. R.*, 294 U. S. 240).

² The president's power to alter the gold content of the dollar was allowed to lapse in 1933.

³ 48 U. S. Stat. at Large, 337-344.

⁴ The stock of gold bullion and coin held by the Treasury on June 30, 1940, was valued at nearly twenty billion dollars. The greater portion is kept buried at Ft. Knox, Kentucky. See S. F. Porter, "Yellow Peril," *Curr. Hist.*, LI, 28-30 (Apr., 1940).

fixed policy, be backed by seventy-five per cent gold and twenty-five per cent silver.¹

The constitution says nothing about paper money—except to forbid the states to issue it. To be sure, there was paper money in circulation after 1789 as before, but for a long time it was in the form only of notes issued by state banks² and by the first and the second Bank of the United States; and in the case of the state bank notes at least, it was often of changing and uncertain value. Long before the Civil War, demand was growing for centralized control over paper currency; and when the national government ran into difficulty in its effort to float loans adequate to carry on that conflict. Congress took the bold step of authorizing the issuance of legal tender paper currency ("greenbacks") and also of passing the National Bank Act of 1863, not only instituting our later system of national banks (now some five thousand in number), but authorizing such banks to issue notes up to ninety per cent of their holdings of United States bonds. Two years later, indeed, it went so far as to place a ten per cent tax on notes issued by state banks, rendering issue of them unprofitable and in effect banishing them from the currency system; and when challenged judicially, this action was upheld.³ For two decades "greenbackism" continued a major political issue, until finally, in the famous Legal Tender Cases, the power of Congress to make paper money legal tender for private debts was definitely sustained.⁴

Paper
money in-
troduced

Today, our government seems to maintain one of the most complicated currency systems in the world. In law, there are no fewer than ten varieties, namely: (1) United States notes, or "greenbacks," issued during the Civil War and backed only by the good faith of the government; (2) gold coins and bullion; (3) gold certificates backed by gold held by the Treasury; (4) Treasury notes of 1890; (5) standard silver dollars and bullion; (6) silver certificates backed by silver dollars held by the Treasury; (7) national bank notes; (8) federal reserve notes, largest by far in quantity, and issued by the federal reserve banks on a backing of commercial paper; (9) federal reserve bank notes, differing only in being based on federal bonds; and (10) minor coins of nickel, copper, and silver.⁵ Actually, however, the currency has been greatly simplified by recent developments. Gold coin and gold certificates are no longer in circulation; all national bank notes are being withdrawn from circulation

¹ 48 U. S. Stat. at Large, 1178-1181. The stock of silver bullion held by the Treasury on June 40, 1910, was nearly two and a half billion ounces. What to do with silver has long been a political issue. See S. Wages, "Silver's Last Stand," *Curr. Hist.*, L, 21-23 (Aug., 1939).

² Although the states were forbidden to issue paper, the federal Supreme Court upheld them in chartering banks authorized to exercise that power.

³ *Veazie Bank v. Fenno*, 8 Wallace 533 (1869).

⁴ *Hepburn v. Griswold*, 8 Wallace 603 (1870); *Knox v. Lee*, *Parker v. Davis*, 12 Wallace 457 (1871); *Juilliard v. Greenman*, 110 U. S. 421 (1884).

⁵ To save nickel for war uses, "nickel-less nickels" began to be minted in 1942. In the same year, the emergency manufacture of pennies made of steel was discontinued, although seven hundred millions of them were left in circulation (until they wear out).

and replaced with an equal amount of federal reserve notes; federal reserve bank notes were never issued in any large amount and are now practically out of circulation; and the less than two million dollars outstanding in Treasury notes of 1890 are likewise being retired. The consequence is that practically (in addition to subsidiary and minor coins) only United States notes, silver certificates, and federal reserve notes are at present in circulation, the last-mentioned being obligations of the twelve federal reserve banks and of the government, and by far the most important kind of money now in use. All coins and currency of the United States are legal tender for the payment of all debts, public and private.¹

From the point of view of the student of government, the most striking fact about the monetary system of the United States today is the high degree of control over it exercised by the president and officials responsible to him. To be sure, most of the powers involved have been conferred by Congress. But successive delegations over a period of years, invariably solicited and urged by the executive, have transferred far-reaching authority to the White House, with the result that a leading writer on American finance can assert: "All this legislation, taken together, gives to the president and his appointees a legal authority over the nation's currency that is almost complete. A Stalin or a Hitler could hardly have more. The things that the president has legal authority to do to the currency directly and their attendant implications could give us a gold standard, a silver standard, a paper money standard, or a commodity dollar standard. They could give us serious deflation or runaway inflation."²

Development of the National Banking System

From the constitution's silence on the subject of banking, strict constructionists of early days deduced that the matter was one for regulation solely by the states. Under Federalist leadership, however, a national bank, known as the Bank of the United States, was established in 1791. Its charter expired in 1811, but a second institution of the kind was set up in 1816; and when its constitutionality was challenged, in the celebrated case of *McCulloch v. Maryland*, the Supreme Court availed itself of the doctrine of implied powers to put practically beyond question the authority of Congress to create banking corporations.³ To be sure, from the time when the second Bank of the United States closed its doors in 1836 until the Civil War, the field was left entirely to banking institutions chartered under widely varying state laws. But the need for a currency of uniform value throughout the country, together with the

¹ So declared by the Agricultural Adjustment Act of May, 1933. Paper money is manufactured in the Bureau of Engraving and Printing at Washington; coins are made at mints located in Philadelphia, Denver, and San Francisco. See J. P. Watson, "The Bureau of the Mint," *Service Monographs*, No. 37 (Baltimore, 1926).

² E. W. Kemmerer, *The A B C of Inflation* (New York, 1942), 27. It should be observed, however, that this passage was written before the president's power to alter the gold content of the dollar lapsed in 1943.

³ See p. 65 above.

desire to facilitate the sale of government bonds on favorable terms during the war, led Congress, in 1863 and 1864, to make provision for a long-delayed national banking system, consisting of banks chartered, regulated, and inspected by national authorities and empowered to issue notes designed to circulate as money. A ten per cent tax on the notes of state banks had the effect, indeed, of giving the new national banks a monopoly of the right to issue notes, a privilege which they enjoyed uninterruptedly until the creation of the federal reserve system in 1913. State banks, however, continued to exist and to carry on a great deal of business, side by side with national banks; and so they do today.¹

Originally, national banks were so many entirely separate institutions, with no more means for coming to one another's relief in time of stress than railroads or merchandising establishments; and from the ups and downs of business during recurring cycles of prosperity and depression flowed embarrassments and failures which often might have been prevented. To remedy this situation, by linking up the whole number of national banks in an integrated series and imparting greater elasticity to their operations, Congress, in 1913, enacted a law creating what is known as the federal reserve system.² Under this centralizing measure, the country is divided into twelve great districts, in each of which is a federal reserve bank, located as a rule in the district's principal city,³ and doing business, not, as in the case of national and state banks, with the general public, but only as a rule with the government and with "member banks," comprising all of the national banks of the district and such state banks as choose to identify themselves with the system. Capital stock (not less than four million dollars in each case) is subscribed principally by the member banks; and supervision of the general system is vested (since 1935) in a board of seven governors appointed by the president for fourteen-year terms, with the bank of each reserve district controlled by a board of nine directors, three appointed by the central board of governors and six chosen by the member banks of the district.⁴

The federal
reserve
system
(1913)

¹ The national banks of the country numbered 5,060 in 1943, and state banks, 9,558. The agency of supervisory control over the national banks is the comptroller of the currency (in the Treasury Department) and his staff of examiners and other officials. Cf. J. G. Hemberg, "The Office of Comptroller of the Currency," *Service Monographs*, No. 38 (Baltimore, 1926).

² 38 *U. S. Stat. at Large*, 251. The reform was inspired primarily by the panic of 1907, bringing to a head the disorganized condition of the nation's money supply, and it largely followed lines recommended by a National Monetary Commission created by Congress in 1908 and reporting in 1912. See H. P. Willis, "The Federal Reserve Act," *Amer. Econ. Rev.*, IV, 1-24 (Mar., 1914), and "The New Banking System," *Polit. Sci. Quar.*, XXX, 591-617 (Dec., 1915); R. G. Thomas, *Modern Banking* (New York, 1937), Chaps. xvii-xix.

³ The federal reserve cities are Boston, New York, Philadelphia, Richmond, Atlanta, Cleveland, Chicago, St. Louis, Minneapolis, Kansas City, Dallas, and San Francisco.

⁴ Of the six directors chosen locally, three may be bankers, but three must be actively engaged in business or agriculture. The chief executive of each district bank—known as the president (formerly the governor)—is chosen by the board of directors for a five-year term, is eligible for reappointment, and must be approved by the central board of governors.

Emergency Banking Legislation of 1933-35

The
banking
crisis of
1933

With important powers over the reserves, discount rates, note issues, and general operations of both reserve banks and local member banks, the federal reserve machinery introduced by the act of 1913 served useful purposes, and in normal times appeared to provide a reasonable remedy for our more serious banking ills. The stock market crash of 1929 and the financial chaos which followed showed plainly, however, that something was still wrong. At all events, our banks proved unable to weather the storm in any such fashion as did those of Great Britain, Canada, and other countries; and not only did many collapse, but it became necessary for President Roosevelt, shortly after taking office in 1933, to bring into play a half-forgotten wartime grant of presidential power and temporarily close every bank in the land. Banks able to demonstrate their soundness were permitted to reopen in a short time; others were given aid and eventually restored; many simply went out of existence. All sorts of drastic changes in an admittedly defective system were proposed—the elimination of state banks in favor of a single set of national banks (for which there is much to be said), the establishment of a great central Bank of the United States on the analogy of the Bank of England, and what not.

Reforms
intro-
duced

In the end, and after much troubled discussion in Congress and the country, reforms were introduced on three main lines. (1) Banking practices were overhauled and toned up, especially under terms of a banking act of 1933;¹ for example, speculative temptations to which great numbers of banks had succumbed in the past were removed by requiring that thenceforth banking establishments should not engage in both commercial, *i.e.*, general, banking, and “investment” banking—if they insisted upon continuing the latter, they must give up the former. (2) In the belief that if depositors have some assurance that their money is safe in banks, they will be willing to leave it there, thus averting bank “runs” and resulting bank closings, a plan of guaranty of bank deposits was introduced temporarily in the act of 1933 and two years later made permanent. Under this arrangement, deposits in banks belonging to the federal reserve system, and also in non-member banks meeting certain conditions, are insured up to a maximum of \$5,000.² (3) Finally, in 1935, the federal reserve system was overhauled rigorously. Not only was the pre-existing administrative machinery reconstructed with a view to lessening the danger of politics entering in, but the presumably ameliorative and corrective functions of the board of governors were materially

¹ 48 *U. S. Stat. at Large*, 162.

² The system is administered by a Federal Deposit Insurance Corporation and financed partly from assessments upon the banks concerned, in the amount of one-twelfth of one per cent annually on total deposits. The effect has been greatly to increase and stabilize bank deposits—although this of itself carries some danger of laxness in making loans. See R. G. Thomas, *Modern Banking* (New York, 1937), Chap. v.

strengthened, especially in the direction of greater flexibility in the reserves which banks are required to maintain, greater freedom in raising and lowering rediscount rates and thereby controlling lending activities, and more power to check inflation or deflation by the sale or purchase of government securities by reserve banks.

Some New Credit Agencies

Along with the foregoing developments directly affecting the country's system of commercial banks arose also numerous new credit or lending agencies, created and supervised by the national government with a view to helping overcome the effects of the depression. Like commercial banks, thrift institutions—such as savings banks, insurance companies, and building and loan associations—found themselves heavily encumbered with “frozen” assets. Railroads, too, suffered in the general decline of security values, and found it impossible to carry on their usual financial operations. Thousands of farmers and home-owners, unable to meet payments upon mortgages, faced foreclosure and dispossession proceedings. From harassed individuals and corporations in all sections of the country appeals poured in upon the national government for assistance that might enable them to tide over the period of stress.

Why
needed

Responding to the demand, and upon recommendation of President Hoover, Congress early in 1932 created the Reconstruction Finance Corporation, patterned after the War Finance Corporation of 1918, and placed under the management of a board of seven directors, three *ex officio* and four appointed by the president and Senate.¹ The new agency was endowed with a capital of five hundred millions, all subscribed by the government, and eventually (being continued and utilized on even a larger scale during the Roosevelt administrations) with far greater sums, with the result that it became a vast super-credit institution, holding a key position in every phase of the government's recovery program. Authorized from the first to make properly insured loans to banks, to trust and insurance companies, to building and loan associations, to agricultural and livestock credit associations, and to railroads, it in time was permitted to extend its ministrations to ordinary private industry, and within a period of less than three years (1932-35) it disbursed the stupendous sum of nearly seven billion dollars. Some of this money went for purposes of relief, but the bulk of it was allocated to institutions and businesses for assistance in reviving commercial, industrial, agricultural, and transportation activities the country over—a procedure sometimes described as “priming the pump” of national prosperity. On the whole, the results were excellent, and many of the loans were repaid in a

The
Recon-
struction
Finance
Corporation

¹ 48 U. S. Stat. at Large, 162, and 52 *ibid.*, 212 (1938). In 1942, the Corporation was placed in the Department of Commerce, where it was administered under the direction of the secretary of commerce. Upon the nomination of Henry A. Wallace to be secretary of commerce, Congress, however, in February, 1945, restored the Corporation to the status of an independent agency. See p. 523 below.

surprisingly short time.¹ As recently as January, 1937, the R. F. C. was widely thought to have served its main purpose; and at that date Congress passed an act to facilitate its gradual withdrawal from lending activities by authorizing the president to suspend or terminate its operations in any field of lending whenever he should find that credit for borrowers in that field was "sufficiently available from private sources to meet legitimate demands."

Before the Corporation could liquidate its lending operations, however, it was authorized by Congress, in 1938, to make additional private loans to combat the recession in business at that time. Moreover, after the launching of the national defense program, it took on many new activities; not only did it play an extremely important rôle in financing industrial expansion by making loans and investments that private capital could not take the risk of making, but it brought into existence several government corporations, such as the Rubber Reserve Company, the Mineral Reserve Corporation, the Defense Plant Corporation, the Defense Supplies Corporation, and the Defense Homes Corporation. And through these organizations, and in other ways, it assisted in the accumulation of reserve supplies of rubber, tin, manganese, and other raw materials indispensable in wartime, aided industrial plant expansion, and helped to provide proper housing facilities for defense workers.²

With officers appointed, and capital stock furnished, by the R.F.C., a Disaster Loan Corporation, created by act of Congress in February, 1937, provides loans made necessary by floods or other catastrophes occurring during the period between January 1, 1936, and January 22, 1947. And within a week after the attack upon Pearl Harbor, temporary war damage insurance was provided through the R.F.C. War Insurance Corporation. With its name soon changed to War Damage Corporation, this new agency provides protection through insurance, reinsurance, or in other ways, against loss of, or damage to, real or personal property which may result from enemy attack or from damage by our own armed forces in resisting enemy attack.

In postwar plans for industrial reconversion, disposal of surplus war material, and creation of jobs to forestall a period of unemployment, the R.F.C. is destined to play a rôle probably matching its depression and wartime activities. For, in the words of a recent head of the Corporation, "it can make loans in any amount, for any length of time, at any rate of interest, to anybody." And the question of whether these great powers

¹ On the early operations of the R. F. C., see J. H. Jones, "Billions Out and Billions Back," *Sat. Eve. Post*, CCIX, 5-7, 23 ff. (June 12, 26, 1937). Cf. *Fortune*, XXI, 42-51 ff. (May, 1940). People inclined to deplore large concentrations of power sometimes criticized the R. F. C., and even pronounced its existence dangerous. No one could deny that it practically held the power of life and death over many large fiscal and business institutions and interests. The general opinion nowadays, however, is that in the struggle for national recovery the agency served a useful purpose without developing the abuses to which it was potentially liable.

² Under authority granted by 54 *U. S. Stat. at Large*, 572, 897, 961 (1940), and four other acts, with amendments. See *U. S. Government Manual* (Summer, 1944), 411-414.

should be used to aid small business and to finance great housing and other projects, and not primarily to aid big business, underlay the opposition to the nomination of Henry A. Wallace in 1945 to succeed Jesse H. Jones as secretary of commerce.¹

Following the precedent set by creation of the Reconstruction Finance Corporation, Congress established other lending institutions during 1932-34, most of them dependent for at least part of their funds upon the backing or assistance of the R.F.C. One group of these secondary credit agencies, designed primarily to afford better credit facilities for agriculture, will be dealt with in a later chapter.² A second group—comprising a system of home loan banks, presided over by a Federal Home Loan Bank Board (1932) and a Home Owners' Loan Corporation (1933)—was designed to relieve home-owners facing the loss of their homes through foreclosure.³ A third group was intended for the aid of people who were trying to save money, and took the form of mutual thrift institutions called federal savings and loan associations and cooperative credit unions, both local in character and private in management.⁴ Finally, a group of credit agencies was set up by the National Housing Act of June, 1934, to stimulate the capital industries and at the same time to bring the government's credit facilities within the reach of the humblest home-owner or home-builder, through loans to small householders for financing low-cost home construction and renovation.⁵

Other
national
credit
agencies

¹ Senator Byrd of Virginia, in opposing the confirmation of Mr. Wallace, called the R.F.C., with its numerous subsidiaries, "the most colossal banking institution the world has ever known, either public or private . . . [and] virtually immune from the control of Congress . . . actually, as it now operates, a fourth branch of the government." *N. Y. Times*, Jan. 23, 24, 25, 1945. For a summary of R.F.C. functions, past and future, see *U. S. News*, Feb. 2, 1945, pp. 13-14; *U. S. Government Manual* (Summer, 1944), 409-426.

² See Chap. xxix below.

³ On the theory that the residential mortgage problem had become a thing of the past, the H.O.L.C., on June 12, 1936, officially terminated its lending operations, and its activities at present are confined to collecting on the loans formerly made. Down to December 31, 1943, the Corporation granted loans totaling more than three billion dollars, to more than a million home-owners. *U. S. Government Manual* (Summer, 1944), 133-134.

⁴ Charters for federal savings and loan associations are granted to "persons of good character and responsibility" when "a necessity exists for such an institution in the community to be served," and when the association can be established "without undue injury to properly conducted existing local thrift and home-financing institutions." As of December 31, 1943, there were 1,466 federal savings and loan associations, with combined assets of \$2,617,000,000.

Federal credit union membership is "limited to groups having a common bond of occupation or association, or to groups within a well-defined neighborhood community or rural district." See W. T. McDermott and F. Crissey, "Three Million Amateur Bankers," *Reader's Digest*, XL, 113-116 (May, 1942).

⁵ Home-builders can borrow up to ninety per cent of the value of the property, and persons repairing or improving their homes up to a maximum of \$2,000. The system is supervised by the Federal Housing Administration. As a means of checking the economic "recession" of 1937-38, the act of 1934 was amended and its benefits greatly extended by Congress in February, 1938. See President Roosevelt's message of November 29, 1937, in *N. Y. Times*, Nov. 30, 1937.

A new chapter in the history of federal assistance to home-ownership was opened in 1944, when the Servicemen's Readjustment Act (popularly known as the "GI Bill of Rights") opened opportunity for honorably discharged veterans to obtain government loans for twenty years to buy or build homes or to acquire farms or business property.

Through this entire series of lending agencies, not only has the national government become a creditor on a large scale, thereby entering into competition with private bankers, but the relations of the government and the private banks of the country have become exceedingly close, each supporting the other and making the other's credit possible.

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CHAPTER XXVII

FOREIGN AND INTERSTATE COMMERCE

Lack of power to control the conditions under which commerce was carried on with foreign countries and among the several states was a main defect of the Articles of Confederation; and, as we have seen, it was a controversy between certain of the states over this matter that set in motion the train of events leading to the Philadelphia convention of 1787. Unimpeded development of trade, both domestic and foreign, being recognized as a prime requisite of national stability and growth, the new constitution was so drawn as to give Congress general power to "regulate commerce with foreign nations, and among the several states, and with the Indian tribes."¹ Indeed, this power stands second in the list of those conferred; and it is doubtful whether any other of the constitution's provisions, except only the taxing clause, has contributed so much to the vigor of the national government as we know it today. Certainly none has had so much to do with developing the close relation long existing between government and business—a relation steadily growing closer and more significant as the commercial enterprises of our people increasingly transcend state and national boundaries.²

The commerce clause and its significance

Commerce carried on wholly within the bounds of a state is left to be controlled exclusively by the state concerned. The grant of federal power over all other commerce is, however, broad and general; of four express limitations imposed, only one—that forbidding Congress to lay a tax or duty on exports from any state—has proved of much importance.³ The breadth of the grant is one of the reasons why a constitution drawn up to meet the needs of an age when stage-coaches, pack-horses, and sailing

Expansion by interpretation

¹ Art. I, § 8, cl. 2.

² The present chapter on commerce and the succeeding one on business cover different phases of what properly is a single subject. Commerce (much of which is itself business) may be emphasized first, since the national government's control over business flows, to a great extent, from its power to regulate commerce.

³ Art. I, § 9, cl. 5. The other three limitations (contained in the same article and section) are: (1) the foreign slave-trade might not be prohibited before 1808; (2) no preference may be given by any regulation of commerce or revenue to the ports of one state over those of another; and (3) vessels bound to or from one state may not be obliged to clear, enter, or pay duties in another state. The first of the three was only temporary, and the second and third have operated merely to prevent discrimination against the commerce of any state or group of states. The prohibition of federal export taxes was a concession to the Southern exporters of agricultural products, designed to shield them from the burden of taxes the weight of which was supposed to fall on the exporter himself. Export taxes, if freely allowed, might have been employed at times not only to obtain revenue but to conserve natural resources by checking shipments of lumber, oil, coal, and other products out of the country. There is, however, nothing in the constitution to prevent regulation of export trade by Congress in any way other than taxation, *e.g.*, by imposing embargoes.

vessels were the principal means of transportation, and when railroads, steamships, airplanes, telegraphs, and telephone and wireless systems were as yet undreamt of, has proved adequate to enable Congress to deal with the infinitely more complex commercial activities of the twentieth century without the alteration of a single word or phrase pertaining to trade regulation. A second reason lies in the development of the doctrine of implied powers, enabling the Supreme Court to read ever-widening meanings into such key terms as "commerce" and "regulate." Beginning with the memorable case of *Gibbons v. Ogden* in 1824,¹ and progressing step by step with the great advances realized in the modes of transportation and communication, the judges have so expanded the scope and meaning of the constitution's language as to keep congressional power reasonably abreast of the nation's requirements. Indeed, as we shall see, they have lately arrived at the highly significant conclusion that the regulatory power conferred extends not merely to matters involved in commerce directly, but also to the conditions under which articles handled in foreign and interstate trade are produced, *e.g.*, the employment of child labor in manufacturing.

Present
meaning
of "com-
merce"
and
"regu-
late"

The upshot is that "commerce" today includes not merely the exchange of commodities, but such varied forms of intercourse as navigation, the construction and maintenance of toll-bridges or ferries crossing rivers separating two states, the transportation of persons, animals, and goods by land, water, or air, the transmission of intelligence by telegraph, telephone, or wireless (including radio broadcasting) and, since 1937, even manufacturing, mining, agriculture, and fishing in so far as concerned with the production of commodities which flow in the channels of interstate or foreign trade.² To be sure, there are processes and transactions which, to the layman at all events, seem quite as closely related to commerce as do some of the things which have been held to be included, but which nevertheless the Supreme Court has thus far regarded as only incidents or aids to commerce and not as themselves commercial acts or instrumentalities. For example, the buying and selling of bills of exchange has been construed not to be commerce; and until June, 1944, the same was true of the issuing of fire, marine, and life insurance policies.³ From

¹ 9 Wheaton 1.

² See pp. 532-533 below.

³ In 1869, the Supreme Court held private insurance companies not to be engaged in interstate commerce, even when most of their business was carried on across state lines; and on this basis all regulation of insurance subsequently developed was by the individual states. In *United States v. Southeastern Underwriters Association* (322 U. S. 533), however, the Court ruled in 1944 that the constitutional power to regulate commerce "includes the power to regulate trading in insurance to the same extent that it includes power to regulate other trades or businesses conducted across state lines." The implication was that the Department of Justice might proceed to prosecute the 196 stock fire insurance companies and 27 individuals on the charge involved in the case decided, *i.e.*, violation of the Sherman Anti-Trust Act by conspiring to fix arbitrary and non-competitive premium rates on fire insurance and to maintain monopolistic controls by boycotts and other means. The interests affected pressed vigorously for legislation protecting them against such action; and Congress so far yielded as to pass an act making the insurance business

time to time, however; by congressional act or judicial construction, new activities, as in the case of insurance, are brought within the meaning of the term; and no man can say where the ultimate limits will be found to lie.

The meaning of "regulate" has likewise undergone judicial interpretation and expansion, having been held to imply the power not only to permit commerce under certain conditions, but also to protect and safeguard it, and even, on the other hand, to prohibit it altogether when Congress considers that such restriction would promote the national well-being.¹ Furthermore, Congress not only may regulate all the instrumentalities of commerce, but may itself create corporations to serve as such instrumentalities.² In short, as a result of judicial decisions, congressional authority may be said to extend to all forms of commercial traffic and intercourse between inhabitants of the United States and foreign countries and between inhabitants of the different states; and it includes the power to enact all legislation appropriate for the protection and advancement of such commerce—"to adopt measures to promote its growth and insure its safety, to foster, protect, control, and restrain."³

Along with the power to regulate foreign and interstate commerce, Congress is given authority to regulate commerce with the Indian tribes. Of some importance in our early history, this phase may now be passed over with the barest mention. Of major significance today are those aspects of congressional authority having to do with the regulation of commerce (a) with foreign nations and (b) among the several states; and to each of these attention will be given in the remainder of this chapter.⁴

Branches
of the
com-
merce
power

substantially immune from prosecution under the anti-trust laws until January 1, 1948, with a view to giving the states an opportunity to take care of the situation, if they can, by making their own regulations more effective. *Public Law 15—79th Cong.* For two discussions antedating the Court decision, see S. Timberg, "Insurance and Interstate Commerce," *Yale Law Jour.*, L, 959-1017 (Apr., 1941); N. R. Berke, "Is the Business of Insurance Commerce?," *Mich. Law Rev.*, XLII, 409-424 (Dec., 1943).

¹ During the past forty years, Congress has enacted many measures which may be described as prohibitions of commerce, most of them applying to interstate commerce, e.g., the Pure Food and Drugs Act of 1906, the Mann White Slave Act of 1910, the Webb-Kenyon Act of 1913 prohibiting shipments of intoxicating liquor into "dry" states, and the "Lindbergh Law" of 1932 making kidnapping, when the victim is taken across state lines, a federal offense. In 1929, Congress passed an act divesting convict-made goods of their interstate character when shipped in interstate commerce, and making such goods subject to the laws of the state of delivery; and the act was upheld by the Supreme Court in *Whitfield v. Ohio*, 297 U. S. 431 (1936). For illustrations in the domain of foreign commerce, see p. 528 below.

² Thus the Inland Waterways Corporation was created by Congress (1920-24) to carry on the operations of the government-owned inland canal and coastwise waterway system.

³ Chief Justice Hughes, in *Texas and N. O. R. v. Brotherhood of Railway and Steamship Clerks*, 281 U. S. 548 (1930).

⁴ Various phases, however, more or less peculiar to the recovery effort of the thirties and to the later defense and war effort will be touched upon at appropriate points later.

The Regulation of Foreign Commerce

Foreign
relations
and the
com-
merce
power

Although the grants of power mentioned are conferred in the same terms, the scope of congressional authority over foreign commerce is in reality the broader of the two. This is explained by the fact that the national government has exclusive, and practically unrestricted, jurisdiction over our relations with foreign nations, such jurisdiction serving in no small measure to reinforce or supplement the authority granted by the commerce clause.¹ Congressional authority to regulate commerce with foreign nations attends and surrounds every voyage or other act of transportation across the national boundaries, even when commencing or terminating at a remote interior point; and inasmuch as the constitution denies to the states the right to tax imports, federal regulation continues to operate until the importer either has sold the original package or has broken it for the purpose of selling its contents. Only when the original package or its contents have "come to rest," and hence are commingled with the general property of the people of the state, does the controlling authority of Congress cease and that of the state begin.²

Types of
regula-
tory
measures

1. Em-
bargoes

In pursuance of its power over foreign commerce, Congress has enacted many kinds of laws, of which only a few of chief importance can be mentioned here.³

To begin with the most drastic, embargoes have been laid, on several occasions, suspending commerce completely with all countries, or with specified ones, or in certain commodities. Sometimes such action has been taken to conserve materials needed for our own defense; sometimes to prevent aid being given to revolution in a foreign country; sometimes to lessen the likelihood of the United States being drawn into foreign war. To facilitate the national defense effort launched in 1940, the president was authorized to prohibit or curtail the exportation of military equipment, munitions, or essential machinery, tools, materials, or supplies; and it was in pursuance of this power that restrictions were laid belatedly upon shipments of scrap iron, steel, and high-octane gasoline to Japan.⁴

¹ It should be observed in this connection that there is a possibility of conflict between the treaty-making authorities and Congress over the regulation of foreign commerce. Although the matter appears to have been placed exclusively in the hands of Congress, treaties may contain provisions tantamount to regulations of commerce, and even inconsistent with existing tariff laws. Congressional power over foreign commerce is further reinforced by the clause which authorizes Congress to define and punish piracies and felonies on the high seas (Art. I, § 8, cl. 10).

² *Brown v. Maryland*, 12 Wheaton 419 (1827).

³ Most of the laws regulating foreign commerce during the decade preceding the present war will be found in *Code of the Laws of the U. S.* (1934), 509-586, 1445-1507, 1977-2075.

⁴ There were embargoes in 1794 and 1812; also during the first World War upon commerce destined for neutral countries whose neutrality was suspected. Further, and more recent, illustrations are afforded by the "neutrality" legislation of 1935-39 designed to lessen the danger of our involvement in war abroad.

A second species of regulation has taken the form of tonnage duties,¹ or taxes based upon the cubical capacity of vessels arriving in American ports from foreign countries. Fiscal motives have been less conspicuous in such regulations than the desire to aid American shipping, either by imposing heavier duties upon ships built or owned in foreign countries than upon American vessels, or by imposing discriminatory duties upon foreign goods imported in any but American vessels. Occasionally, also, such duties have been resorted to by way of retaliation for discriminations against American ships or trade by other countries, although such retaliatory duties have usually been of short duration.

Navigation and inspection laws, enacted by the first Congress and on numerous occasions since, form perhaps the largest and most varied single class of strictly commercial regulations.² Chief among the varied purposes of these statutes have been protection of American shipping, stimulation of shipbuilding, safeguarding the health and safety of passengers, and insuring the safety, and rights of seamen. Of special importance in this connection is the La Follette Seamen's Act of 1915.

As a spur to shipbuilding, the government has at various times granted subsidies, directly or indirectly, to private companies. In 1916, Congress created a United States Shipping Board for the purpose of developing a naval auxiliary and a merchant marine; and in 1920 and 1928, the Board's powers were expanded along lines more directly related to the promotion of peacetime commerce. Direct subsidies to private steamship lines—such as have been common enough in foreign lands—have generally been strongly opposed in this country. Nevertheless, between 1928 and 1936 heavy subsidies, in disguise, were provided in the form of lucrative contracts for carrying the mails overseas; and in the last-mentioned year direct subsidization was introduced under the terms of a Merchant Marine Act whereby the government engaged to pay half the cost of constructing merchant vessels for the foreign trade, to lend the remaining half, and even to bear part of the expense of operation.³

Tariff laws are the regulations of foreign commerce with which the average citizen is probably most familiar. When the main object of such measures is the protection and stimulation of home industries, rather

¹ The constitution expressly forbids states to levy tonnage duties without the consent of Congress. Such permission was, however, granted in numerous instances in the early history of the country for the purpose of enabling the states to improve their harbors. When the national government assumed the work of harbor improvement, construction of lighthouses, buoys, etc., the main motive for granting such privileges disappeared.

² Most of these regulations apply also to coastal vessels and to shipping on the Great Lakes when engaged in interstate and foreign commerce. Cf. J. G. B. Hutchins, "One Hundred and Fifty Years of American Navigation Policy," *Quar. Jour. of Econ.*, LIII, 238-260 (Feb., 1939).

³ The act also abolished the United States Shipping Board and transferred administration in this domain to a United States Maritime Commission, consisting of five persons appointed by the president and Senate for terms of six years. In November, 1937, the Commission submitted to Congress a comprehensive *Economic Survey of the American Merchant Marine* (Washington, 1937). Cf. C. D. Lane, *What Citizens Should Know About the Merchant Marine* (New York, 1941).

2. Tonnage duties

3. Navigation and inspection laws

4. Laws for promotion of a merchant marine

5. Protective tariffs

than the production of revenue, their legal justification is to be found quite as much in the power of Congress to regulate foreign commerce as in the taxing power.¹

6. Immi-
gration
laws

Laws which restrict or otherwise regulate immigration have, similarly, a two-fold legal basis. Over all matters relating to immigration, the national government has exclusive jurisdiction,² both by reason of the power granted in the commerce clause and also by virtue of the fact that such jurisdiction is an incident of the power of a sovereign government to control its own foreign relations.³

7. Other
laws
stimu-
lating
foreign
trade

For the furtherance of our foreign commerce, and to act, if required, as fiscal agents of the United States, Congress as early as 1913 authorized national banking associations having a capital and surplus amounting to one million dollars to establish branches in foreign countries or in American dependencies. Early in 1934, too, the Export-Import Bank of Washington was created by executive order "to facilitate exports and imports and the exchange of commodities between the United States and other nations."⁴

Foreign-
trade
zones

The establishment of foreign-trade zones in any port of entry in the United States, in its territories, and in Puerto Rico was authorized by Congress in 1934. These zones, or "free ports," are simply carefully restricted areas of a few acres, with adequate warehouses and terminal facilities, where foreign merchandise entering the country—especially that which requires some processing, assembling, or intermixture with American products—may be stored, exhibited, graded, repacked, and trans-shipped to a foreign port, without entering the American market and without being subject to the payment of customs duties. Such zones operate either as private or as state- or municipally-owned corporations whose capital is supplied either by private individuals or by some state or local government; and they are believed to be of much potential importance for the future development of our foreign trade.⁵

The Regulation of Interstate Commerce

The regulation of commercial transactions which are begun, wholly carried on, and completed within a single state falls exclusively to the

¹ Tariff legislation and reciprocal trade agreements have been considered elsewhere (see pp. 510-511 above).

² Passenger Cases, 7 Howard 283 (1848).

³ Chinese Exclusion Cases, 130 U. S. 581 (1889); 149 U. S. 698 (1893). On the regulation of immigration, see pp. 119-122 above.

⁴ "Rôle of the Export-Import Bank in Expanding Postwar Trade Relations," *U. S. News*, Dec. 13, 1944, pp. 45-46.

⁵ Administration of the act (48 U. S. Stat. at Large, 998-1003) is vested in a Foreign-Trade Zones Board, consisting of the secretaries of commerce, the treasury, and war. The government has thus far (1945) made only two grants for foreign-trade zones: one to the city of New York, to establish a zone at Stapleton on Staten Island, opened February 1, 1937; and the other to the Alabama State Docks Commission, to operate a zone at Mobile, opened July 21, 1938. Applications are pending (1945) for the establishment of zones at Houston, Texas, New Orleans, and Jersey City.

authorities of that state.¹ But the moment such a transaction crosses a state boundary it ceases to be intrastate, and becomes interstate, commerce; and not only does the interstate character attach to a shipment of goods, under such circumstances, the moment it is delivered by the shipper at the freight-office, warehouse, or depot of a common carrier, *i.e.*, a railroad, steamship, or express company, but it continues to adhere to the transaction throughout the entire journey and until the goods have been delivered to the consignee. Only then do the authorities of the state in which they have arrived have a right to tax them or otherwise to regulate their sale or use. It is substantially correct to say that Congress enjoys *exclusive* authority to regulate interstate commerce; and this authority reaches to water-borne and air-borne commerce as well as to commerce carried on by land, or partly by land and partly by water. Indeed, wherever navigable waters form, either in their natural condition or by artificial union with other waters, a continuous highway over which commerce is carried on between two or more states, or with a foreign country, they become "navigable waters of the United States," whose use Congress may control as an incident of the power to regulate foreign and interstate commerce. Even though a river is not navigable naturally and no improvements are contemplated, the Supreme Court has held that it may be classified as navigable if it can be made so by "reasonable improvement." And the commerce power is not limited to considerations of navigation. "Flood protection, watershed development, recovery of the cost of improvements through utilization of power, are likewise parts of commerce control. . . . The authority of the government over the stream is as broad as the needs of commerce."²

What is
inter-
state
com-
merce?

Moreover, even in the immediate field of transportation, congressional power over interstate commerce does not stop with the mere movement of articles, animals, persons, or intelligence from state to state; it includes also the relations of those engaged in such transportation with their employees. Thus Congress may legally require railway companies to equip their trains with safety appliances, to reduce the number of hours

¹ This general proposition, however, while true, requires some qualification. When interstate and intrastate operations of carriers are so related that regulation of the one involves control of the other, Congress is entitled to regulate *both*. Thus if cars employed only in local transportation are hauled as part of a train along with cars used in interstate transportation, they must be equipped with the safety appliances required by the federal Safety Appliance Act. *Houston, East & West Texas Ry. Co. v. U. S.* (Shreveport case), 233 U. S. 342 (1914); *Wisconsin v. C., B. & Q. Ry.*, 257 U. S. 563 (1922). Indeed, since every time an article is produced or sold within a state, the market is to that extent reduced for a similar article produced in another state, even purely intrastate commerce tends to take on an interstate aspect, with the result, as we shall see, that the power to regulate commerce among the several states may, and sometimes is, construed to extend to transactions which of themselves have no interstate character.

For the enforcement of its own regulations, practically every state has established some administrative board or commission, variously called a railway commission, a public utilities commission, or a commerce commission.

² *United States v. Appalachian Electric Power Co.*, 311 U. S. 377 (1940). Cf. E. R. Abrams, "The State Commissioners' Dispute with the FPC," *Public Utilities Fort.*, XXXIII, 269-280 (Mar. 2, 1944).

The
Supreme
Court's
broad-
ened con-
ception
since
1937

a day which their employees work, to grant employees compensation when injured in the course of their employment, to bargain collectively with employees' representatives, and to provide retirement or pension systems.

And, as previously indicated, there is still more. A good while ago, the question inevitably arose of whether Congress had authority to legislate concerning conditions under which manufacturing and mining were carried on when such conditions were more or less related to interstate commerce. For a long time, the Supreme Court replied emphatically in the negative, saying that manufacturing and commerce were two quite different matters and that federal regulatory authority extended only to commerce, or at all events to matters affecting commerce *directly*. When, for example, in 1916, Congress passed the first child labor law, forbidding shipment in interstate commerce of products of any factory, shop, or mine employing children under stipulated ages, the Supreme Court—with Mr. Justice Holmes strongly dissenting—overthrew the measure as being aimed (as indeed it was) primarily at regulating, not commerce, but manufacturing and mining.¹ Against a rising tide of contrary opinion, this point of view was maintained for another twenty years. Then, however, it gave way. Beginning in 1933, numerous statutes enacted to promote national recovery proceeded from the bold assumption that, properly construed, the commerce clause gives Congress authority to regulate substantially the entire business structure of the country, including wages, hours, and other working conditions, prices, volume of production, the buying and selling of securities—in short, anything that affects interstate commerce *directly or indirectly*. And, although most of the earlier acts in the series were overthrown judicially on the ground of being too free in their delegations of power or pushing the commerce power to unjustifiable lengths, or both, in 1937 a majority of the Court unexpectedly swung around to the view that, nearly all manufacturing and other production being, under present-day conditions, carried on with reference to the interstate or national, or even the international, market, the commerce clause may properly be construed to empower Congress to promote the health of interstate and foreign commerce by any measures benefiting the health of business in general.² Not only (as we shall see presently) were the National Labor Relations Act of 1935 and the Fair Labor Standards ("Wages and Hours") Act of 1938 upheld on the ground, largely, that manufacturing which carries with it transportation of raw materials and finished products in interstate commerce is not separable from such commerce, but later decisions upheld the authority of Congress to do such remarkable things as (1) to prohibit the marketing of desig-

¹ *Hammer v. Dagenhart*, 247 U. S. 251 (1918).

² It was, of course, significant that the Court came by this change of heart while President Roosevelt was carrying on his campaign for "liberalizing" that body; and, as pointed out elsewhere, the new orientation, reinforced by the appointment of liberal-minded justices to existing seats as they fell vacant, turned what was in form a presidential defeat into an effective victory. See pp. 475-476 above.

nated farm products in interstate commerce, as a means of controlling production; (2) to regulate transactions in tobacco warehouses when subsequent shipment of the tobacco to other states is contemplated; and (3) to fix prices for agricultural products which are "in the current" of interstate commerce. Indeed, in upholding the constitutionality of all important federal regulatory laws that have come before it in the most recent years, the Court has rarely pointed out any limits that remain on the exercise by Congress of its power to regulate business as an incident of regulating commerce. More and more, it proceeds on the principle that, in general, business is commerce and commerce (at least most of it) is business.¹

Of a vast number of commercial transactions, it is easy to say that they are wholly subject to state control, and of others it is equally easy to say that they are clearly of an interstate nature, which removes them entirely from state control. If all could be classified so simply, few, if any, causes of friction would be likely to arise between state and national authorities over matters of commercial regulation. Much difficulty of this sort, however, has arisen, because many transactions unfortunately cannot be made to fit completely into either of two such mutually exclusive categories. State commercial regulations, for example, often affect interstate commerce. If they are challenged, and the Supreme Court considers that their main purpose is the protection of the health or safety, or promotion of the convenience, of the state's own inhabitants, or that they are primarily of only local application (such as laws regulating pilotage), they nevertheless will be upheld as not amounting to an invasion of Congress' exclusive right to regulate interstate commerce; but otherwise they are likely to be overruled.²

Relation
of state
and na-
tional
control

¹ The insurance decision of 1944, discussed above, is obviously in line with this tendency. In another recent decision, the Court even went so far as to bring within the scope of the regulatory power of Congress employees engaged in the maintenance and operation of buildings occupied by tenants engaged "in commerce or in the production of goods for commerce," *i.e.*, engineers, watchmen, elevator operators, and others. The work of such employees has "so close and immediate a tie with the process of production for commerce" that they are to be regarded as engaged in "an occupation necessary to the production of goods in interstate commerce." *Kirchbaum v. Walling*, 316 U. S. 517 (1942). See M. M. Davission, "Coverage of the Fair Labor Standards Act," *Mich. Law Rev.*, XLI, 1060-1088 (June, 1943).

The newer view commented on in the foregoing paragraph was developed and discussed (a good while before the Court itself adopted it) in E. S. Corwin, "Congress's Power to Prohibit Commerce; A Crucial Constitutional Issue," *Cornell Law Quar.*, XVIII, 477-506 (June, 1933), and "Some Probable Repercussions of 'Nira' on Our Constitutional System," *Annals of Amer. Acad. of Polit. and Soc. Sci.*, CLXXII, 139-144 (Mar., 1934). See W. H. Hamilton and D. Adair, *The Power to Govern* (New York, 1937), in which an interesting attempt is made to show that in the era when the federal constitution was framed, "commerce" not only was "more than we imply now by business or industry," but "a name for the economic order, the domain of political economy, the realm of a comprehensive public policy." See also A. S. Abel, "The Commerce Clause in the Constitutional Convention and in Contemporary Comment," *Minn. Law Rev.*, XXV, 432-494 (Mar., 1941); H. Rottschaefer, "The Constitution and a Planned Economy," *Mich. Law Rev.*, XXXVIII, 1133-1164 (June, 1940).

² The subject of interstate trade barriers is pertinent here, but has been considered on pp. 112-113 above.

The Inter-
state
Com-
merce
Act
(1887)

Aside from appropriations for the improvement of rivers and harbors, little national legislation affecting interstate commerce was enacted until some sixty years ago. Railroads naturally took on an interstate character at an early stage of their development; but regulation of their operations was long left entirely to the states. Only after the Civil War, when railway-building set in on a greatly increased scale and the inadequacy of state regulation became increasingly manifest, was a movement started for control over them by national authority. The upshot was the passage by Congress, in 1887, of the Act to Regulate Commerce,¹ first of a long series of national statutes regulating railways and other public service corporations with a view to preventing excessive charges, discriminations, and other unfair practices. And not only did the measure lay down principles and rules which such corporations must observe, but it created a special agency—the Interstate Commerce Commission—to administer and enforce them.

Present
scope and
forms of
regula-
tion
under it:

With numerous amendments and interpretations greatly enlarging its original scope, the act of 1887 now applies to all interstate commerce carried on by railroads, by common carriers by water (both inland and coastal), by express companies, by sleeping-car and other private-car companies, by motor-bus companies, and by pipe-lines, except those for the transportation of gas and water; likewise, to bridges, ferries, car-floats, and lighters, and indeed to terminal and other facilities of whatsoever character when used in the interstate transportation of persons and freight.²

1. Re-
strictions
imposed

Upon all corporations operating any of these instrumentalities of public service are imposed numerous restrictions, each prompted by some earlier abuse. Thus, (1) dispatchers and trainmen must not be employed, in interstate commerce, longer than nine and sixteen hours, respectively, within any period of twenty-four hours; (2) rates for the transportation of persons and freight and for the transmission of messages must be just and reasonable; (3) rebating, directly or indirectly, and undue discrimination or preference between persons or localities are prohibited under severe penalties; (4) charging a higher rate for a short haul than for a long one over the same line in the same direction is forbidden, except in certain special instances when authorized by the Interstate Commerce Commission; (5) free transportation may be granted by carriers only to narrowly restricted classes of persons; (6) common carriers are prohibited, except in a few special cases, from operating, owning, or controlling, or having any interest in, any competing carrier by water; and (7) carriers may not issue stocks, bonds, or other securities

¹ 27 *U. S. Stat. at Large*, 379.

² Until 1934, the act applied also to all instrumentalities and facilities used for the transmission of intelligence by means of electricity, such as telegraph, telephone, cable, and wireless systems. Since that date, however, these have been provided for in a separate Communications Act. See p. 537 below.

without previous consent of the Interstate Commerce Commission.¹

In addition to these restraints, numerous positive duties have been imposed. For example, (1) printed schedules of rates must be kept open for public inspection, and changes in them may be made only after permission has been granted by the Interstate Commerce Commission; (2) full and complete annual reports must be made to the Commission, covering such matters, and arranged in such form, as the Commission prescribes; (3) all accounts must be kept according to a uniform system authorized by the Commission; (4) in case of injury to any of its employees, a carrier must grant pecuniary compensation, unless the accident was caused by the willful act or negligence of the injured party; (5) the standard or basic work-day for railway employees engaged in the operation of trains is eight hours, and carriers must adapt their wage schedules to this standard, and grant overtime pay; (6) all trains engaged in interstate commerce must be equipped with automatic safety appliances; and (7) all railway companies so engaged must maintain compulsory retirement and pension systems for their superannuated employees.²

2 Duties imposed

The Interstate Commerce Commission—the administrative board charged with enforcing the regulations indicated, and innumerable minor ones as well—consists of eleven members appointed by the president and Senate for seven-year terms, and has a staff of some 2,400 clerks, attorneys, examiners, statisticians, investigators, and technical experts, organized in thirteen major bureaus, each under a director or chief who reports directly to a commissioner or to the full Commission. The commissioners work largely in divisions, or panels, of not fewer than three members each; and a decision of a division has the same force and effect as a decision of the Commission itself—subject to the entire Commission granting a rehearing. Divisional hearings are sometimes held in cities in distant parts of the country; and under certain conditions, the Commission may delegate work to boards of three or more eligible employees.³

The Interstate Commerce Commission

¹ In 1933, the Commission was given jurisdiction over railroad holding companies, and its control over mergers and consolidations was broadened.

² The Railroad Retirement Act of 1934 was invalidated by the Supreme Court in May, 1935, as "in no proper sense a regulation of interstate transportation." *R. R. Retirement Board v. Alton R. R.*, 295 U. S. 330 (1935). In August, 1935, Congress sought to achieve the same end by passing two separate, though obviously related, acts—one under the commerce power and the other under the taxing power. The former provided for a pension system for superannuated railway employees; the latter provided for raising the funds needed to support the pension system by an excise tax upon the payrolls of railroads and an income tax upon employees earning up to \$300 a month. The constitutionality of the new laws was later attacked in the courts, but before the Supreme Court passed upon the issues raised, the railroads and their organized employees, urged by the President, worked out together a new and mutually satisfactory retirement plan which was embodied in two new acts passed by Congress in June, 1937—the Railroad Retirement Act and the Carriers Taxing Act. 50 U. S. Stat. at Large, 307, 435.

³ The Commission's dependence upon the assistance of outside people in carrying on its work, and the methods employed by special interests to influence its policies and decisions, are brought out in E. P. Herring, "Special Interests and the Interstate

Power
over
rates

Under the original law, the Commission did not have power to make rates, either upon its own initiative or upon complaint of shippers that existing rates were unreasonable. Ultimately, however, although only after a vigorous campaign of popular education, and in the face of persistent opposition from the carriers—the necessity of conferring extensive rate-making power was brought home to the national mind; and under laws passed in 1906 and 1920, the Commission is authorized, on complaint and after hearing, not only to fix “just and reasonable” rates, regulations, and practices, but also to prescribe definite maximum or minimum, or both maximum and minimum, charges.¹

Juris-
diction
extended
to motor
carriers

No one needs to be told of the remarkable development of interstate, as well as intrastate, commercial transportation arising from the general use of motor vehicles, together with large-scale building of motor highways. For a considerable time, interstate bus and truck traffic remained entirely unregulated, except in so far as affected locally by state regulations based upon licensing and police powers; and, just as in the early days of railroad transportation, abuses of all sorts were plentiful. Demand for federal regulation was voiced by the Interstate Commerce Commission and other agencies long before Congress got around to the problem. A Motor Carrier Act of 1935, however, brought all interstate bus and truck lines within the pale of federal law and made the I.C.C. the regulating authority, with the further interesting mandate that the Commission aim at developing an articulated nation-wide system of rail and motor transportation.²

Also to
carriers
by water

Another enlargement of the Interstate Commerce Commission's powers came with the passage of the Transportation Act of 1940,³ revising many details of existing law and declaring it the aim of Congress' transportation policy to develop, coördinate, and preserve “a national transportation system by water, highway, and rail, as well as by other means.”

Commerce Commission,” *Amer. Polit. Sci. Rev.*, XXVII, 738-751, 899-917 (Oct.-Dec., 1933). For a full summary of the duties of the Commission, see any recent edition of the *Official Congressional Directory*, or of the *U. S. Government Manual*.

¹ Rate-making and other proceedings by the Commission assume substantially the character of proceedings in a court of justice: the various parties are represented by their attorneys, witnesses are examined, and documentary and other evidence is submitted. Decisions are embodied in rulings and orders enforceable in the federal courts in proper proceedings, and to these courts appeals may be taken by parties affected adversely.

On December 23, 1941, the President established an Office of Defense Transportation “to assure maximum utilization of the domestic transportation facilities of the nation for the successful prosecution of the war” and named the late Joseph B. Eastman, then chairman of the I.C.C., as director. The chief function of the Office (which is a unit in the Office for Emergency Management) is to coördinate rail, motor, inland waterway, pipe-line, and air transportation, and coastwise and inter-coastal shipping. A. Lauterbach, “Government Coördination of Transportation in War and Reconstruction,” *Jour. of Politics*, VI, 404-429 (Nov., 1944).

² 49 U. S. Stat. at Large, 543-567. Excepted from provisions of the law are trucks carrying newspapers, those belonging to farmers' cooperative associations, taxicabs, and certain other classes of vehicles. Cf. H. M. Miller [comp.], *Federal Regulation of Motor Transport* (New York, 1933), and W. H. Wagner, *A Legislative History of the Motor Carrier Act, 1935* (Washington, D. C., 1935).

³ 54 U. S. Stat. at Large, 898.

To this end, the Commission was given jurisdiction over common carriers by water (both inland and coastal), similar to its authority over motor vehicles. At the same time, a board was created to investigate "the relative economy and fitness" of carriers by rail, by motor vehicles, and by water.

Rapid development of radio broadcasting on a nation-wide, and also international, scale raised other new and pressing problems.¹ Partly because of the more technical nature of the work to be done, regulation in this field was assigned in 1927, not to the Interstate Commerce Commission, but to a separate Federal Radio Commission, charged with issuing licenses and assigning wave-lengths, and with various other functions. Additional authority conferred in the following year did not enable the Commission to perform its increasingly complex task to the general satisfaction; and, the conviction having developed also that the overburdened I.C.C. was expending its time and energies on transportation matters to the neglect of difficulties connected with interstate and international electrical communications, Congress, in 1934, passed a Communications Act (a) abolishing the Federal Radio Commission and transferring its work to a new Federal Communications Commission, and (b) withdrawing telephone, telegraph, and cable regulation from the I.C.C. and vesting it in the new agency, which therefore now has for its province the entire field of interstate and foreign communications by both wire and radio.² Speaking generally, the powers, functions, and procedures of the Communications Commission are similar to those of the I.C.C., with allotment and control of the use of the air lanes in accordance with "public interest, convenience, and necessity" one of the agency's most formidable tasks.³

Regulation of
electrical
communi-
cations

¹ In various European countries, including Great Britain, radio facilities are owned and operated, directly or indirectly, by the central government. In the United States, the federal government has certain such facilities of its own (mainly for military and naval use), but in general radio systems are under private ownership and management with merely government regulation as in the case of railroads and steamship lines.

² 48 U. S. Stat. at Large, 1064. The Communications Commission has seven members, appointed by the president and Senate for seven-year terms. U. S. Government Manual (Summer, 1944), 477-481. On the earlier agency of radio regulation, see L. F. Schmeckebier, "The Federal Radio Commission," *Service Monographs*, No. 65 (Baltimore, 1932); and cf. "The American vs. the British System of Radio Control [Symposium], *Cong. Digest*, XII, 202-224 (Aug.-Sept., 1933); C. J. Friedrich and E. Sternberg, "Congress and the Control of Radio Broadcasting," *Amer. Polit. Sci. Rev.*, XXXVII, 797-818, 1014-1026 (Oct., Dec., 1943).

³ Almost from the beginning, the Communications Commission aroused dissatisfaction in one quarter or another, owing to (1) petty politics within the Commission itself; (2) its policy of licensing broadcasting stations for periods of only six months; (3) the alleged practice of summoning stations to untimely license-renewal hearings; (4) the Commission's policy in relation to international broadcasts; (5) its delay in permitting the marketing of receiving television sets; (6) its efforts to check the growth of monopolies in radio broadcasting; and (7) the ordering of drastic revision in the broadcasting industry's internal structure. See "Government by Commission," *Fortune*, XXVII, 86-89 ff. (May, 1943); L. D. Farrar, "The FCC Controversy," *Pub. Util. Fort.*, XXXII, 216-222 (Aug. 19, 1943); P. A. Walker, "How Coöperation Works in Communication Regulation," *ibid.*, XXXII, 267-274 (Sept. 2, 1943); C. J. Friedrich and E. Sternberg, "Congress and the Control of Radio Broad-

Board
of War
Communi-
cations
and
Office of
Censor-
ship

In order to "coördinate the relationship of all branches of communication," President Roosevelt in September, 1940, issued an executive order setting up a Defense Communications Board, headed by the chairman of the Federal Communications Commission. Originally, the Board was only a planning agency, without operating or procurement functions, and with no power to censor radio or other communications, or to take over any facilities. Acting under authority conferred by Congress to insure federal control of wires in endangered territories, the President, however, in March, 1942, assigned it full power in relation to "the use, control, and closing of stations and facilities" for wire communications; and in the following June, the agency's name was changed to the Board of War Communications. A cognate Office of Censorship, established in December, 1941, was given "absolute discretion" in censoring communications by mail, cable, radio, or other means of transmission passing between the United States and any foreign country.¹

Regula-
tion of
aviation

Among the newer forms of commerce that have gained rapidly in importance in recent years is transportation by aircraft. As in the case of radio, the national government has been interested in building up services of its own, for use both in peace and in war; and between 1926 and 1938, through a branch of the Department of Commerce known as the Bureau of Air Commerce, it also encouraged, and to some extent regulated, private aviation. Under the Civil Aeronautics Act of 1938² an over-all Civil Aeronautics Authority was established as an independent agency composed of the Civil Aeronautics Authority (in a more limited sense) of five members, an Administrator of Civil Aeronautics, and an Air-Safety Board of three members. In 1940, the name of the five-member body was changed to Civil Aeronautics Board; certain of its functions were shifted to the Administrator; the Air-Safety Board was abolished, its functions being assigned to the Civil Aeronautics Board; and this Board and the Administrator were transferred to the Department of Commerce. The Board, however, continues to operate mainly as an independent agency, while the Administrator serves under the direction and supervision of the secretary of commerce. Together, the Administrator and the Board constitute the Civil Aeronautics Authority, which, however, discharges no functions as such—all of its responsibilities being discharged, rather, by either the Administrator or the Board. Through one or another of these interlocking agencies are performed the basic tasks of mapping, lighting, and marking interstate airways, providing emergency and regular landing fields, licensing planes and pilots, and

casting," *Amer. Polit. Sci. Rev.*, XXXVII, 797-818, 1014-1026 (Oct., Dec., 1943); T. P. Robinson, *Radio Networks and the Federal Government* (New York, 1943); and annual reports of the Federal Communications Commission.

¹ See p. 691 below, and cf. B. Price, "Governmental Censorship in Wartime," *Amer. Polit. Sci. Rev.*, XXVI, 837-849 (Oct., 1942); R. O. Walter, *American Government at War* (Chicago, 1942), Chap. vi; and L. V. Howard and H. A. Bone, *Current American Government* (New York, 1943), Chap. vii.

² 52 U. S. Stat. at Large, 973.

controlling rates for the transportation of passengers, mail, and express in much the same manner that the Interstate Commerce Commission controls railway, motor-vehicle, and water rates. The Board also investigates accidents, and is empowered to prescribe air-safety rules and regulations and to suspend or revoke licenses after hearing.¹

In the past two or three decades, production of hydroelectric power has assumed the proportions of a major industry. Not only has the national government itself, notably through the Tennessee Valley Authority, gone into the power business on an impressive scale, but colossal private corporations, having possessed themselves of choice power sites, are engaged in distributing and selling electrical energy over wide interstate areas. It so happens that about eighty-five per cent of the total potential water-power resources of the country are located on the public domain; and this means that the authority to regulate arises not only from the commerce clause (wherever electric energy is distributed across state boundaries), but also from the right of Congress to control the use of the public lands—and indeed of navigable waters as well. Since 1930, national regulation has been vested in a Federal Power Commission of five members appointed by the president and Senate for five-year terms and clothed with authority to license water-power projects undertaken on the public domain or on navigable waters by private or municipal agencies, and also to regulate rates, services, and the issue of securities by the licensees, provided the states affected cannot act individually or are unable to agree.² The Power Commission's jurisdiction was considerably enlarged by the Public Utility Act of 1935, which conferred authority also to regulate private utilities engaged in the transmission of electric energy across state lines, including rates, services, business practices, and security issues.³

Regulation of water power

The Department of Commerce

Impressed with the growing urgency of national problems relating to commerce and industry, Congress, in 1903, acted upon recommendation of President Theodore Roosevelt and created as a ninth executive department a Department of Commerce and Labor. Ten years later, Labor was set off as a separate department. Nevertheless, charged with an extraordinary variety of activities and housed in one of the largest government buildings in the world, the Commerce Department still is of major interest and importance. Eight main bureaus and services, together with a

Origins

¹ *U. S. Government Manual* (Summer, 1944), 403-406. Cf. M. W. Willebrandt, "Federal Control of Air Commerce," *Jour. of Air Law*, XI, 204-217 (July, 1940); C. L. Morris, "State Control of Aeronautics," *ibid.*, XI, 320-330 (July, 1940).

² *United States v. Appalachian Electric Power Co.*, 311 U. S. 377 (1940). Cf. L. V. Plum, "The Federal Power Commission Grows Up," *Pub. Util. Fort.*, XXII, 67-73 (July 21, 1938); O. Ryan, "Federal and State Coöperation Under the Federal Power Act," *State Government*, XI, 139-140, 154-155 (Aug., 1938).

³ H. L. Elsbree, *Interstate Transmission of Electricity* (Cambridge, Mass., 1931). See p. 559 below.

number of subsidiary units, are presided over by chiefs or directors under the secretary of commerce, an under-secretary, and an assistant-secretary.

Bureau
of Foreign
and
Domestic
Commerce

On the strictly commercial side, the most important bureau is that of Foreign and Domestic Commerce, which for many years was engaged on a large scale not only in collecting and publishing commercial statistics and in studying general business trends throughout the world, but in directly promoting American export trade and rendering services of many kinds to American business men abroad. As a result of having perhaps somewhat overreached itself as a promoter, and also of the drastic curtailment of foreign-trade opportunities since 1939—to say nothing of the war—the Bureau's operations abroad have now been reduced; indeed a Foreign Commerce Service which it once maintained was in 1939 transferred by executive order to the Department of State. For the advancement of domestic commerce, however, it maintains twenty-six offices at strategic business centers throughout the country, each occupied with gathering information and coöperating with local organizations such as chambers of commerce and boards of trade; it engages in long-term studies of broad trends and developments in the national economy; and in wartime it is especially occupied with gathering and transmitting information on sources of supply, production capacity, procurement, and substitutes, at the request of emergency agencies.

Bureau
of Standards

The connection of other bureaus with commerce is significant, yet more incidental.¹ A Coast and Geodetic Survey assists mariners by charting the coast-lines of the United States and its dependencies, as well as lake and river beds and ocean currents, and makes seismological observations with a view to reducing the earthquake hazard. A Weather Bureau (transferred from the Department of Agriculture in 1940) operates the basic national system of meteorological observations for the country, collects and analyzes these observations, and prepares and distributes weather forecasts and warnings. A Patent Office (about which something will be said in the next chapter) administers the patent laws enacted by Congress. A Bureau of Standards carries on research in fields in which precise measurements are required, and compares and tests standards of measurement employed in scientific investigation, commerce, and educational institutions with the standards adopted or recognized by the government. Such were the original functions of the Bureau; with the passing years, however, its work has expanded until it has come to be one of the outstanding scientific institutions of the country, carrying on tests and investigations of petroleum and its products, aeronautic and engineering instruments, the properties and possible utilization of organic

¹ In 1942, the functions of a Bureau of Marine Inspection and Navigation were distributed between the Bureau of Customs (Treasury) and the U. S. Coast Guard (Navy).

materials and of china, porcelain, and building materials, besides rendering important metallurgical services. A large part of its work is carried on at the request of, or in coöperation with, agencies of the national government; but it coöperates also with state and local officials, with business and professional groups, and (for example, through sponsorship of quality-guaranteeing labels) with the public itself.

Finally there is the Bureau of the Census. Charged with taking the decennial census required by the constitution, this "greatest fact-finding and figure-counting agency in the world" is responsible also for various supplementary enumerations provided for by statute. Until a few decades ago, decennial censuses were taken by a staff specially organized on each occasion for the purpose, and when the work was completed the machinery was dismantled, to be set up anew at the next census period. A permanent census office, under a director, was, however, established in 1902,¹ partly with a view to developing an experienced staff, but mainly in order to enable the work to be done more painstakingly by being carried on, in one phase or another, practically all of the time. The range of census inquiries has increased steadily, and the resulting published reports, although at first glance dry and forbidding, yield the student who refuses to grow discouraged comprehensive and illuminating surveys of the country's population, occupations, wealth, and significant tendencies.²

Bureau
of the
Census

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² W. S. Holt, "The Bureau of the Census," *Service Monographs*, No. 53 (Baltimore, 1929); L. F. Schmeckebier, *The Statistical Work of the National Government* (Baltimore, 1925). On the taking of the sixteenth decennial census in 1940, see *Report of the Secretary of Commerce* (1940), 37-60. Cf. S. Chase, "What the New Census Means," *Pub. Affairs Pamphlet No. 56* (New York, 1941).

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CHAPTER XXVIII

GOVERNMENT AND BUSINESS

Our national government was founded in a period when the idea was prevalent that there should be little or no political interference with the natural and normal course of business enterprise. Government, to be sure, might and should remove obstacles to the free flow of such enterprise; and it is not to be forgotten that in the first decade under the constitution the federal authorities laid business under heavy obligation by putting the national credit on a secure basis, establishing a sound monetary system, chartering a United States Bank, and creating other favorable conditions so notoriously lacking under the Articles of Confederation. Even the measures required for these purposes, however, encountered sturdy opposition, on constitutional or other grounds; and that government should embark upon positive regulation or control of business interests, operations, and practices would to most people have seemed totally undesirable.

Earlier
ideas on
the
subject

A century and half, however, has brought a remarkable change. Not only does government nowadays encourage and promote business in a multitude of ways undreamt of in the times of Hamilton and Jefferson, but it has swept a mighty regulating arm over virtually the entire field of commercial, industrial, and financial activity, fixing conditions of competition, forbidding practices held to be objectionable, and, under copious legislation originating largely with the New Deal, controlling production, prescribing minimum wages and maximum hours, requiring collective bargaining, and prohibiting false or misleading advertisements of commodities and securities. Indeed, it has itself gone into business, in competition with private capital. Of late, both its managerial and its regulative activities have been expanded enormously as a result of the national defense effort launched in the early summer of 1940 and the war thrust upon us a year and a half later. Commodity priorities and price-ceilings are merely random symbols of the new order that has arisen. To what extent the relations of government and business will prove to have been affected permanently by this most recent experience remains to be disclosed; but the consequences are likely to be weighty.

Great
change,
later

Following our survey of the regulation of foreign and interstate commerce, we turn to this field of general business—logically enough, since most of the regulatory powers involved are derived directly from, or are closely associated with, the commerce clause of the constitution. Confining our attention to the national scene, we may here (1) comment briefly on certain government aids to business not touched

upon in the preceding chapter, (2) review the development of government regulation prior to the great depression of the thirties, (3) outline some extraordinary measures of 1933-37 aimed at promoting national recovery, (4) call attention to major innovations under the defense and war program, and (5) comment on one or two aspects of the government's direct participation in business, notably its conduct of the postal service.

Some Government Aids to Business

In point of fact, there is not much that the national government undertakes that does not actually or potentially, directly or indirectly, serve the interests of business. The maintenance of friendly intercourse abroad, the stationing of consuls in foreign cities, the upkeep of the Army and Navy for national defense, the preservation of domestic law and order, the regulation of commerce, the provision of a currency system, the control of banking, the operation of a postal service, and what not—all make for conditions obviously indispensable if the business interests of the country are to thrive. Protective tariffs in some ways restrict business, and certainly are not to be considered indispensable to it, yet are presumed also to have fostered business, at least in the domain of manufacturing. Three activities, however—grounded upon express grants of power in the constitution—may be singled out for mention here: (1) the maintenance of a system of weights and measures, insuring the fixity of standards which business practice requires, (2) the granting of copyrights and patents, and (3) the regulation of bankruptcy.

¹ Weights
and
measures

The authority given Congress to "fix the standard of weights and measures"¹ is so unrestricted that it can be, and has been, exercised in respect to all manner of measurements—length, weight, volume, temperature, strength, quality, and others; and to aid in the determination of such standards, the Bureau of Standards, mentioned previously, is maintained in the Department of Commerce. Along with the familiar units taken over from old English usage—the pound, yard, gallon, bushel, etc. (with their derivatives), the metric system employed in Continental countries, and having some decided advantages, has been given official status, even though as yet but little actual use is made of it outside of scientific circles. So far as developed to the present time, the function of the national government is merely to "fix" standards, keep models in the Bureau of Standards, and furnish models or copies to the states, leaving it almost entirely to the state governments to require conformity to the appropriate standards in business and other transactions in so far as they choose to do so.

² Copy-
rights
and
patents;

The constitutional basis of our laws and regulations relating to copyrights and patents is a grant of authority to Congress "to promote the progress of science and the useful arts" by securing to authors and

¹ Art. I, § 8, cl. 5.

inventors, for limited periods, "the exclusive right to their respective writings and discoveries."¹ Administration of the copyright laws falls within the jurisdiction of a Copyright Office in the Library of Congress, where it is carried on by an official known as the register of copyrights. Patent laws and regulations are administered by the Patent Office in the Department of Commerce.

Copyright has been defined as "the exclusive right secured to an author by statute to reproduce and publish his work"; and under United States law this right is conferred for a period of twenty-eight years, with option of one renewal for an equal period. As now construed, it includes the exclusive right to translate, dramatize, and present a work; and in the case of a musical composition, the right to perform it publicly for profit, and also to exact a fixed royalty for its reproduction by mechanical instruments. Copyright thus extends not only to books, but also to magazines, works of art, charts, maps, musical compositions, cartoons, motion pictures, and photographs. A grant is made to every person who applies in conformity with the law, the Division of Copyrights making *no effort to ascertain whether there is any infringement of a previously copyrighted publication or production*. Where such infringement occurs, the injured party can seek redress only through a suit for damages, or by injunction proceedings, in the federal courts.²

A patent may be granted to any person who has invented or discovered "any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvements thereof, not known or used by others in this country . . . and not patented or described in any printed publication in this or any foreign country . . . and not in public use or on sale in this country for more than one year" prior to the filing of the application. Once a patent has been issued, it is out of the jurisdiction of the Patent Office; questions of infringement, the scope of the patent, and any other issues arising out of the grant are determined in the federal courts. The term for which a patent runs is seventeen years; and during that period, the protection of the patent law extends throughout the continental United States, Alaska, Hawaii, and the Canal Zone, and, upon compliance with certain regulations, also Puerto Rico, the Philippines, the Virgin Islands, and Guam. The rights secured by authors and inventors under the copyright and patent laws, however, are clearly monopolistic—the "exclusive right to their respective writings and discoveries" is what the constitution expressly guarantees—with the result that people who receive them are sometimes brought into collision with the anti-trust laws prohibiting contracts in restraint of trade. Upwards of half of all patents issued in the civilized world have been granted in the Patent Office of the United States; the millionth was issued in 1911,

¹ Art. I, § 8, cl. 8.

² In order to receive the protection of our copyright laws, books printed in the English language must be type-set in the United States.

and the two-and-one-third-million mark was passed in 1944.¹ Each applicant pays a fee of forty dollars, and the Patent Office has become one of the relatively few government establishments that not only pay their way, but normally yield a surplus. It is hardly necessary to add that the records and models preserved at Washington afford an unsurpassed panorama of the progress of the industrial and scientific arts in the past hundred years.²

3. Bankruptcy:
Legislation of
1898

Bankruptcy is one of a number of matters over which the national and state governments have concurrent legislative power; and for a long time it was left largely or entirely to state control. In 1898, however, Congress passed a general bankruptcy act;³ and thereupon former state laws on the subject either were repealed or fell into a condition of suspended animation. It is still permissible for a state to legislate on bankruptcy. But in all cases of conflict the national law takes precedence; and this law is so comprehensive that little need or room for state action survives. Proceedings in bankruptcy cases come under the jurisdiction of the federal district court of the district in which the bankrupt resides, most of the details being attended to by a referee in bankruptcy, appointed by the judge of the court, and making full reports to the court from time to time in accordance with law; and in a period of numerous bankruptcies, like the decade of the thirties, much of the time and energy of district judges are consumed by the supervisory work entailed. After a bankrupt's assets have been inventoried and equitably distributed among his creditors, the judge enters a decree discharging him from all further legal liability for debts incurred prior to the commencement of the bankruptcy proceedings.

¹ In the ten years ending June 30, 1941, the average number of applications filed was 61,960 and the average number of patents granted was 47,837.

² Much testimony was presented to the Temporary National Economic Committee of 1938-41 (see p. 553, below) concerning the close relationship often existing between the possession of patent rights and the development of monopolies, and the Committee recommended a number of changes in the patent laws as a corrective. To study the subject further, a National Patent Planning Commission was created in 1941, from which came, two years later, a report upholding the existing system as a whole, but proposing a number of additional safeguards such as (1) compulsory recording in the Patent Office of all agreements between American and foreign patentees, (2) shortening to twenty years the possible time between application for a patent and the patent's expiration (although patents run for only seventeen years, it has been possible to keep an application pending over a long period of years, thus in effect indefinitely prolonging the protection enjoyed), and (3) establishment of a court having to do only with patent appeals. Legislation on these, or related, lines remains to be enacted. See O. R. Barnett, *Patent Property and the Anti-Monopoly Laws* (Indianapolis, 1943); T. Arnold, "We Must Reform the Patent Laws," *Atlantic Mo.*, CLXX, 47-54 (Sept., 1942); W. T. Kelley, "Restraints of Trade and the Patent Law," *Georgetown Law Jour.*, XXXII, 213-233 (Mar., 1944); and A. E. Kahn, "Fundamental Deficiencies of American Patent Law," *Amer. Econ. Rev.*, XXX, 475-491 (Sept., 1940).

In addition to granting patents, the Patent Office registers trademarks and labels for use on goods distributed through channels of interstate and foreign commerce. Registration is for twenty years, is indefinitely renewable, and can be protected through appeal to the courts.

³ 30 U. S. Stat. at Large, 544. Before enactment of this statute, national bankruptcy laws were in force only in 1801-03, 1841-43, and 1867-78. See C. C. Rohlfing *et al.*, *Business and Government* (2nd ed., Chicago, 1935), Chap. xviii.

An inevitable accompaniment of a business depression is a sharp increase in the number of persons becoming bankrupt, and of corporations thrown into the hands of receivers on account of inability to pay their debts; in fact, bankruptcy cases outnumbered all other kinds in the federal courts in 1934. For some time before the severe depression of the thirties, the law of 1898 was criticized sharply; and the further evidence of its shortcomings now furnished resulted in an important series of amendments, beginning with a measure of March, 1933, opening the bankruptcy courts to persons (with special provisions for farmers) and to railroads (but not to other corporations) whose liabilities may not be greater than their assets, but who merely cannot pay their debts as they mature. Such parties are not to be called bankrupts, but rather "debtors"; and the law facilitates and encourages settlements between such honest debtors and their creditors without the stigma of bankruptcy. Insolvent railroads are permitted to work out plans of reorganization, under the supervision of the Interstate Commerce Commission, for approval by the bankruptcy courts, and in this way are enabled to avoid the delays, friction, and expense commonly attending receivership proceedings in a court of equity. Many have been, and still are, doing this.¹

Legisla-
tion of
1933

To meet the needs of private corporations excluded from the privileges granted by the act of 1933, a further measure was passed in 1934 permitting such corporations to reorganize as debtors (not bankrupts) with the consent of a majority of their creditors, under the guidance of the bankruptcy courts; while at the same time another measure (the Frazier-Lemke Act) amended the act of 1933 for the benefit of farmers unable to obtain relief under the provisions of that law. On the ground that it deprived mortgagees of property without due process of law, the Supreme Court, in 1935, held the latter legislation unconstitutional.² A substitute farm mortgage moratorium act of 1935, planned to avoid the grounds upon which the earlier act was invalidated, was, however, upheld.³ As the depression deepened, many counties, cities, and other local-government units found themselves unable to meet the principal and interest on their bonds or other forms of indebtedness, and in 1934 Congress passed a Municipal Bankruptcy Act extending to such "taxing districts" privileges similar to those granted to other debtors in the amendment of 1933. In 1937, the Supreme Court held the act unconstitutional.⁴ But in the same year a substitute measure, excluding counties, successfully provided a method by which insolvent taxing authorities could effect compositions with their creditors; and in 1940 the new law (now revised so

Exten-
sions in
1934-37

¹ The court officers in charge of such reorganizations are called trustees, instead of referees, and the railroads are termed debtors, not bankrupts. The text of the act of 1933 and of other amendments to the Bankruptcy Act of 1898 will be found in *Code of the Laws of the U. S.* (1934), 333-346.

² *Louisville Joint Stock Bank Co. v. Radford*, 295 U. S. 555 (1935).

³ *Wright v. Vinton Branch Mountain Trust Bank*, 300 U. S. 440 (1937).

⁴ *Ashlon v. Cameron County Water Improvement District No. 1*, 298 U. S. 513 (1936).

as to be applicable also to counties and special assessment districts) was made operative up to June 30, 1942.¹

Taken together, the measures enumerated proved of substantial importance in accelerating the normally slow processes of business and agricultural recovery, especially by permitting speedy readjustment, on a sound basis, of debts owed by railroads and other corporations. At the same time, the opprobrium of bankruptcy was entirely avoided in the case of any company whose affairs were susceptible of reorganization. Finally, in 1938, Congress enacted a general consolidation of the bankruptcy laws designed to coördinate and unify the revised system.²

Federal Regulation of Business Combinations and Practices

State
regulation
inade-
quate

For upwards of a hundred years—while the Supreme Court continued to regard Congress as having no power to regulate interstate commerce except as to matters involved *directly* in commerce—the states were left to deal alone with monopolistic and other practices interfering with the free flow of trade; and whatever correctives they brought to bear rested either simply upon the old common-law principle that all combinations operating to restrain trade *unreasonably* are illegal or upon statutes defining or modifying that principle's applications.

The
Sherman
Act
(1890)

In earlier and simpler days, no great amount of difficulty was experienced. But with the rise of manufacturing and other business establishments of large proportions, and operating over wide interstate areas, state regulation proved increasingly inadequate; and in 1890, Congress, taking a broader view of its commerce powers than did the judges, risked judicial disapproval by passing a notable measure—the Sherman Anti-Trust Act—aimed at protecting trade and commerce against unlawful restraints and monopolies, and to that end, declaring, in sweeping terms, every contract, combination, or conspiracy in restraint of trade or commerce among the several states or with foreign nations to be illegal, and providing heavy penalties for violations.³ No special agency, however, was created to administer the law; the Department of Justice showed little zeal for enforcing it; a Supreme Court decision in the Sugar Trust case of 1895,⁴ fully anticipated by many people, severely narrowed its scope by ruling that although the defendant produced all but two per cent of the sugar used in the United States, its business was primarily *manufacturing*, rather than *commerce*, and therefore subject to regulation only by the states; and for a decade thereafter virtually nothing happened.

¹ 50 U. S. Stat. at Large, 693; 54 *ibid.*, 667. As recently as 1938, it was estimated that 3,100 local governments (about two per cent of the total in the United States) were in default. By February 1, 1941, the number was reduced to 1,261: 146 counties, 493 cities and towns, 497 school districts, and 125 other districts. *Mun. Year Book* (1941), 196.

² 52 U. S. Stat. at Large, 840.

³ 26 U. S. Stat. at Large, 209.

⁴ *United States v. E. C. Knight Co.*, 156 U. S. 1 (1895).

"Trust-busting" was one of President Theodore Roosevelt's prime interests, and successful prosecution of the Northern Securities case by the government in 1905 gave him fresh impetus. Notwithstanding government victories in other cases, however, the Supreme Court again weakened the law by setting up a distinction between combinations which, in the Court's opinion, involved only a "reasonable," and those which amounted to an "unreasonable," restraint of interstate or foreign trade. In cases in 1911 against the American Tobacco Company and the Standard Oil Company, for example, the Court applied this "rule of reason" and in effect read into the law declaring illegal "every" combination, etc., in restraint of trade, the word "unreasonable," after the word "every." The effect was practically to reverse or overrule certain earlier decisions in which the Court had held that *all* such combinations in restraint of trade came within the inhibition of the statute.

The
"rule of
reason"

The decisions in the two cases mentioned naturally suggested that if the law applied only to "unreasonable" combinations and contracts, some means should be provided whereby well-intentioned combinations might know definitely whether they would be regarded by the government as "reasonable," and therefore lawful, without first being subjected to a criminal prosecution to determine their status. Demand arose, too, for clarification as to the kinds of contracts that the government would look upon as unreasonable restraints upon trade, and as to the trade practices that it would regard as constituting unfair competitive methods. The upshot was (1) the passage, in 1914, of the Clayton Anti-Trust Act to reinforce and supplement the Sherman Act of 1890, and (2) the creation, in the same year, of the Federal Trade Commission to carry on the large amount of investigative work involved in passing upon specific cases, and to lend its support to effective law enforcement.¹

Need for
further
legisla-
tion

Vigorously sponsored by President Wilson as a "new law" to meet "conditions that menace our civilization," but opposed with equal energy by business interests, the Clayton Act (1) forbade price-cutting to drive out competitors, granting rebates, making false assertions about competitors, limiting the freedom of purchasers to deal in the products of competing manufacturers, and a long list of other abuses, discriminations, and restraints of trade; (2) forbade corporations to acquire stock in competing concerns and outlawed interlocking directorates in the case of larger banks and other corporations; (3) made officers of corporations personally liable for violations of the act; and (4) made it easier for injured parties in cases arising under either this act or the original anti-trust law to prosecute their suits. Labor had been disturbed because in certain anti-trust cases, notably the Danbury Hatters' case of 1908,² the Supreme Court had taken the position that boycotts instituted by labor unions obstructed the flow of commerce among the states

The
Clayton-
Anti-
Trust
Act
(1914)

¹ 38 U. S. Stat. at Large, 730. •

² Loewe v Lawlor, 208 U. S. 274.

and therefore came within the inhibitions of the Sherman Act. To meet this situation, and in compliance with the demand of organized labor, the new measure stipulated that nothing in the anti-trust laws "shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations... or to forbid or restrain the individual members of such organizations from carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the anti-trust laws."¹

Its en-
force-
ment

President Wilson hailed the statute as supplying "clear and sufficient law to check and destroy the noxious growth [of monopoly] in its infancy." In practice, however, it proved less effective than had been hoped. In interpreting "unfair methods of competition," the courts grew increasingly conservative; efforts to make directors personally liable for the action of corporations almost completely broke down; during the first World War, the restrictive legislation was, to all intents and purposes, suspended; under succeeding Republican administrations, it was seldom invoked; and in later days the work of regulating trusts and breaking up monopolies had to be undertaken again almost from the beginning. For a long time, even when an Administration honestly tried to inject new life into anti-trust-law enforcement, it was compelled to operate within a very narrow compass because of the failure of Congress to provide adequate funds for properly staffing the anti-trust division of the Department of Justice, leaving it possible to prosecute only the most flagrant cases in a few large industries.

During the New Deal decade, however, more generous provision was made, and by about 1937 the Department was able to undertake nationwide investigations of a considerably larger number of complaints,² and to institute numerous suits in the courts.³ Furthermore, the emphasis shifted from the old idea of "trust-busting" for the sake of trust-busting to that of defending a free market in the necessities of modern life; and with this more broadly social end in view, prosecutions were directed primarily against private groups which had established themselves in

¹ Although hailed by the labor leader Samuel Gompers as "labor's charter of freedom," this part of the law proved disappointing to organized labor because of the manner in which the courts interpreted and applied it in specific cases, e.g., *United Mine Workers v. Coronado Coal Co.*, 259 U. S. 344 (1921). On some recent cases involving labor unions, see C. O. Gregory, "The Sherman Act v. Labor," *Univ. of Chicago Law Rev.*, VIII, 222-245 (Feb., 1941); D. F. Cavers, "Labor v. the Sherman Act," *ibid.*, 246-257 (Feb., 1941), and "And What of the Apex Case Now?," *ibid.*, VIII, 516-520 (Apr., 1941); L. B. Boudin, "Organized Labor and the Clayton Act," *Va. Law Rev.*, XXIX, 272-315 (Dec., 1942), 395-439 (Jan., 1943).

² The government does not go out and hunt situations capable of being developed into anti-trust cases. When a complaint appearing legitimate comes in, the anti-trust division simply decides whether to make it the basis for instituting proceedings against the accused.

³ In the three years preceding June 30, 1940, the work of the anti-trust division increased more than one hundred per cent. In fiscal 1940, 345 anti-trust suits were instituted and 280 terminated; of the latter, the government won 265 and lost fifteen.

strategic positions of control—against “bottlenecks of business” that blocked the distribution of particular products from raw materials to the ultimate consumer.¹

Hardly was this more enlightened and aggressive enforcement of the anti-trust laws under way, however, before it became necessary to slow it down to meet the exigencies of wartime production: in March, 1942, the President announced that prosecutions would be postponed wherever such a course would clearly tend to promote the production of materials needed for war use.² At the same time, it was promised that the Administration would take every precaution to protect the public interest, and that no one would be permitted to escape ultimate prosecution for any violation of law; and it is understood that the Department of Justice is merely awaiting the end of the war to resume “trust-busting” in a vigorous way. In every instance of postponement, too, it has had to be proved that immediate prosecution would really impede the war effort.³

Wartime
postpone-
ment of
prosecu-
tions

¹ Some idea of the range of later anti-trust prosecutions may be gathered from the fact that outstanding cases in recent years have involved charges against upwards of two hundred Southeastern fire insurance companies, the Associated Press, the Pullman Car Company, four large chemical corporations and their foreign affiliates, fifteen of New York City's largest department stores, two of the largest chain grocery-store companies, the American Waxed Paper Association, the Diamond Match Company and eleven associated concerns, eight major motion picture companies and their affiliates, eighteen major oil companies and others (often called the Madison oil case), the American Medical Association, eighteen leading automobile tire manufacturers, Chicago milk dealers and related labor unions, optical and other glass manufacturers, the General Electric Company, contractors and labor unions in building industries, the Fashion Originators Guild of America and the Millinery Creators Guild, the American Society of Composers, Authors, and Publishers, German- and British-controlled borax corporations, eighteen major producers engaged in selling stainless steel, and forty-seven Western railroads. By August, 1944, 114 anti-trust cases were pending in the Department of Justice.

Among almost innumerable books and articles relating to the general subject may be cited: T. W. Arnold, *Anti-Trust Law Enforcement, Past and Present* (Washington, D. C., 1940), and *The Bottlenecks of Business* (New York, 1940); series of articles on “The Sherman Anti-Trust Act and Its Enforcement” in *Law and Contemporary Problems*, VI, 1-160 (Winter, 1940); and C. D. Edwards, “Thurman Arnold [for several years in charge of anti-trust-law enforcement] and the Anti-Trust Laws,” *Polit. Sci. Quar.*, LVIII, 338-355 (Sept., 1943).

Especially interesting developments have included a decision bringing the insurance business within the scope of interstate commerce (see p. 526, note 3, above), and the conviction of the American Medical Association in *American Medical Association v. United States*, 317 U. S. 519 (1943). On the latter, see B. D. Raub, Jr., “The Anti-Trust Prosecution Against the American Medical Association,” *Law and Contemporary Problems*, VI, 595-605 (Autumn, 1939); and cf. O. Garceau, *The Political Life of the American Medical Association* (Cambridge, Mass., 1941).

² “If it is true,” said the President, “that any substantial slowing up of war production is being occasioned by anti-trust suits, prosecutions, or court investigations, then the war effort must come first, and everything else wait. For unless that effort is successful, the anti-trust laws, indeed all American institutions, will become quite academic,” *N. Y. Times*, Mar. 29, 1942.

³ In June, 1942, Congress entirely exempted from prosecution under the anti-trust laws and the Federal Trade Commission Act any acts or omissions “deemed in the public interest” and approved by the chairman of the War Production Board after consultation with the attorney-general. 56 U. S. Stat. at Large, 357, 781.

The trials of twenty-four anti-trust cases and two investigations were postponed during the fiscal year 1943. Despite this interruption, forty-three cases were successfully concluded, fifty-two were filed, and 152 investigations were instituted. *Ann. Rep. of the Attorney-General* (1943), 8-9. See T. K. Fisher, “Anti-Trust During National Emergencies,” *Mich. Law Rev.*, XL, 969-1004, 1161-1199 (May-June, 1942).

Passage of the Clayton Act in 1914 was accompanied by establishment for the first time of a special agency to cooperate with the Department of Justice in the enforcement of anti-trust laws, new and old, *i.e.*, the Federal Trade Commission. To this body were assigned the very important duties of (1) preventing persons and corporations (except banks and common carriers) from using unfair methods of competition in commerce;¹ (2) conducting investigations of, and requiring reports from, corporations engaged in interstate commerce (except banks and common carriers); (3) investigating compliance by defendant corporations with anti-trust decrees issued by federal courts; (4) reporting, at the direction of the president or of either house of Congress, the facts relating to alleged violations of the anti-trust laws; (5) making recommendations for the readjustment of the business of corporations found to be violating the anti-trust statutes; and (6) studying foreign trade conditions and practices affecting the foreign trade of the United States, and reporting recommendations to Congress.²

Like its prototype, the Interstate Commerce Commission, the Federal Trade Commission is outside, and quite independent of, any executive department. Consisting of five persons appointed by the president and Senate for seven-year terms, it has the assistance of a staff of over six hundred persons, organized in about a dozen main sections and divisions. Each case to be considered is first assigned to a commissioner for investigation and report. If inquiry shows a corporation or firm to be guilty of unfair competitive methods or other violations of law, the offender is summoned before the Commission, and a formal hearing takes place,

¹ A Miller-Tydings amendment, passed as a rider to the District of Columbia appropriation act of August, 1937 (50 *U. S. Stat. at Large*, 693), excepts from the sweeping prohibitions of contracts in restraint of trade "contracts or agreements prescribing minimum prices for resale of a commodity which bears . . . the trade-mark, brand, or name of the producer or distributor" whenever such contracts are lawful under state laws applying to interstate trade. More than forty states have enacted laws permitting such contracts, and those of Illinois and California have been upheld by the Supreme Court. Cf. J. C. Peppin, "Price-Fixing Agreements Under the Sherman Anti-Trust Law," *Calif. Law Rev.*, XXVIII, 297-351, 667-732 (Mar., Sept., 1940); V. Countryman, "The Federal Trade Commission and the Courts," *Washington Law Rev.*, XVII, 83-100 (Apr., 1942).

² The Commission also enforces (1) an amendment of 1936 to the Clayton Anti-Trust Act, known as the Robinson-Patman Anti-Discrimination Act, and designed to prevent sellers from arbitrarily giving advantages to some buyers, as against others, through disguises such as advertising allowances and brokerage fees; (2) the Wheeler-Lea Truth-in-Advertising Act of 1938; and (3) the Wool Products Labelling Act of 1939, which seeks to protect producers, manufacturers, and consumers against the presence of unrevealed substitutes and mixtures in wool products. Under the Robinson-Patman Act, it is now unlawful for any person engaged in commerce "to discriminate in price between different purchasers of commodities of like grade and quality, where such commodities are sold for use, consumption, or resale . . . and where the effect of such discrimination may be substantially to lessen competition, or tends to create a monopoly in any line of commerce." The measure (49 *U. S. Stat. at Large*, 1526) was both defended and opposed in Congress as a means of protecting "independent" merchants against the competition of "chain stores," and often was referred to as the "Chain-Store Act." See B. Werne [ed.], *Business and the Robinson-Patman Law* (New York, 1938); C. B. Baly, Jr., "Four Years Under the Robinson-Patman Act," *Minn. Law Rev.*, XXV, 131-188 (Jan., 1941).

after which an order is issued embodying the conditions to be fulfilled if the offender wishes to come under the protection of the laws and escape prosecution before the courts. Appeal may be taken to a circuit court of appeals, and ultimately to the Supreme Court; but an order of the Commission, when accepted by the parties, or when sustained after appeal to the courts, has full force of law.¹

Although the anti-trust laws have checked the growth of monopolies, they have not proved a wholly effective instrument for preventing the undue concentration of wealth and economic control; indeed, statistics indicate that, in spite of them, there has been a distinct trend toward such concentration—a trend, furthermore, which the present war may prove to have accentuated. Troubled by this situation, President Roosevelt, early in 1938, recommended to Congress that it provide for “a thorough study of the concentration of economic power in American industry and the effects of that concentration”; and as a result a Temporary National Economic Committee was set up, consisting of three members of each branch of Congress and one representative each from six of the executive departments or agencies—thus bringing together representatives of both the lawmaking and the law-administering branches of the government. Between June, 1938, and March, 1941, this Committee heard more than five hundred witnesses and studied elaborate reports prepared by government agencies, notably on the great life insurance companies, the iron and steel industry, the petroleum industry, and patents. In the end, however, the Committee presented only divided recommendations; and the effort expended, reflected in twenty thousand pages of testimony, has not borne fruit in any significant legislation.²

The Temporary National Economic Committee

Some Measures Inspired by Depression Experience

The great depression of the thirties has now receded into the past, and even the memory of it has tended to be dulled by the exciting wartime prosperity of these later years. The period, however, was prolific in legislation aimed at promoting economic recovery; and while some of the measures enacted were overthrown by the courts, or for other reasons proved only temporary, there has come down to us an extensive and important residue of enduring federal controls in the domains of industry, agriculture, communications, finance, social security, and what not. Next in the present chapter we must bring to view certain of these controls that fall within the broad domain of business. Others will come to light later.

As the depression broadened and deepened in 1930-33, agriculture,

¹ E. P. Herring, “Politics, Personalities, and the Federal Trade Commission,” *Amer. Polit. Sci. Rev.*, XXVIII, 1016-1029 (Dec., 1934), and XXIX, 21-35 (Feb., 1935), is an illuminating analysis of the “atmosphere” in which the Commission does its work.

² M. W. Watkins, “The Monopoly Investigation,” *Yale Rev.*, XXVIII, 323-339 (Winter, 1939); *Final Report and Recommendations of the Temporary National Economic Committee*, 77th Cong., 1st Sess., Sen. Doc. No. 35 (Washington, D. C., 1941).

The impetus to new federal regulation

which for a good while had been hard-pressed, appeared to be confronted with ruin, and the entire business structure of the nation seemed headed toward collapse. For years, Western and Southern farmers had been calling upon the federal government for aid; and to their appeals were now added those of millions of unemployed industrial workers, as well as the pleas of bankers and business men, many of whom in more prosperous days had been accustomed to deplore all, or nearly all, governmental regulation of business activity. With thirteen to fourteen million men out of work, wages of those still employed approaching starvation levels, the stock market registering the despair of investors, and intellectuals discussing a threatened collapse of capitalism, pressure for relief for the distressed grew irresistible; and no sooner was the Roosevelt Administration installed in office, in March, 1933, than Congress was called in special session and set to passing a veritable stream of daring measures aimed at checking the course of deflation and turning the country in the direction of business rehabilitation. Some of the new laws were based on congressional authority to tax, to appropriate, and to borrow; others, on the authority to regulate banking and the currency; still others—and this was a principal resource—on the power to regulate interstate and foreign commerce. Chief among the measures resting on this last-mentioned foundation were the National Industrial Recovery Act, the first Agricultural Adjustment Act, and the Securities Act (all of 1933), the Securities Exchange Act of 1934, the second Recovery Act of 1935, the Public Utility Holding Company Act of the same year, the Commodity Exchange Act of 1936, and a second Agricultural Adjustment Act of 1938—a list of regulatory statutes that may now be briefly reviewed, with, however, those relating to agriculture reserved for comment in the following chapter.¹

1. The National Industrial Recovery Act (1933)

Although destined to only brief survival, the most spectacular statute in the series was the National Industrial Recovery Act, approved on June 16, 1933,² and pronounced by President Roosevelt "the most important and far-reaching ever enacted by the American Congress"; certainly, in so far as industry and trade were concerned, the measure embodied the heart and soul of the New Deal. Starting from the assumption that the power to regulate foreign and interstate commerce includes the power to remove burdens from such commerce and obstructions to its flow, the framers of the Recovery Act sought (1) to spread work among the unemployed by abolishing child labor and reducing working hours; (2) to speed up industrial production, and by raising wages to increase the purchasing power of the people; (3) to throw new safeguards around the rights of labor to organize and strike; (4) to promote collective bargaining and minimum-wage agreements; (5) to reduce the waste of com-

¹ For a good general history of the period, see B. Rauch, *The History of the New Deal, 1933-1938* (New York, 1944).

² 48 U. S. Stat. at Large, 195.

petition in trade and industry; and (6) to introduce some degree of planning against recurrence of economic depressions.

To attain these objectives, "codes of fair competition," covering hours, wages, and other matters, were drawn up for the different industries and trades by representatives of the industries and trades concerned, in conjunction with hastily appointed N.R.A. administrators;¹ and, once adopted and given presidential approval, a code was binding upon all persons engaged in the given industry, with heavy fines for violation. The ideal was a new pattern of industrial self-government, with the Recovery Act as a sort of constitution and the codes as laws; and it was hoped that enlightened self-interest, reinforced by public opinion, would give the more fundamental features of the system substantial permanence, perhaps eventually on a voluntary basis. Within a year, some five hundred codes were in operation, with twenty-three million workers under them, and two hundred other codes were in process of adoption. General direction was vested, under the president, in an elaborate National Recovery Administration.²

For nearly two years, the government proceeded with this far-reaching, if not revolutionary, policy of regulating business and working conditions. In May, 1935, however, the Supreme Court dealt it a fatal blow by holding that the Recovery Act (then almost at the end of the two-year period to which it was limited, unless renewed) delegated powers of an essentially legislative nature to the president, and also attempted to stretch the commerce power to cover the regulation of hours and wages of labor as well as other aspects of industry that were primarily manufacturing and not directly related to interstate or foreign commerce—on which account the act was declared unconstitutional.³ Thereupon, the president lost all power to prescribe and enforce codes; the codes themselves ceased to have binding effect; hour and wage standards collapsed; child labor reappeared; and the huge administrative mechanism that had been built up became only a shadow of its former self.

On the eve of the expiration of the original Recovery Act, and to meet the devastating decision of the Supreme Court, Congress, in June, 1935, adopted a resolution extending portions of the act until April 1, 1936. Practically all that remained, however, was authority for trades and industries to agree *voluntarily* on wages, hours of work, collective bargaining, and the elimination of child labor, provided the president

¹ The device of the code was not altogether an innovation. As secretary of commerce (1921-29), Herbert Hoover had given official encouragement to the formation of codes of fair practices and to price-fixing agreements. What was new in the Roosevelt program was the attempt to extend the code system to all types of industry, small as well as large, and to maintain effective government supervision over all the procedures involved.

² For a good general analysis, see L. Lyon *et al.*, *The National Recovery Administration* (Washington, 1935).

³ *Schechter v. United States*, 295 U. S. 495 (1935). The majority argument ran largely on the lines of that advanced in the Sugar Trust case of 1895. (See p. 548 above).

The act
invalid-
dated
(1935)

The new
Recovery
Act
(1935)

gave his approval to such voluntary "codes."¹ The new Recovery Act retained none of the original code-making and enforcement provisions, and the experiment of the preceding two years might have been regarded as liquidated substantially without lasting result, but for two significant contemporary developments: (1) passage, in 1935, of the National Labor Relations [Wagner] Act, salvaging practically the whole of a section (7a) of the original Recovery Act guaranteeing the right of collective bargaining, and (2) adoption, in 1936, of the less comprehensive, but nevertheless important, Government Contracts [Walsh-Healey] Act. The first of these can be commented upon more appropriately when we come later to the general subject of labor relations.² But it may be noted here that the Government Contracts Act³—often referred to as the "Little N.R.A."—was designed to perpetuate Recovery Act standards in an area in which there could be no question of constitutionality, *i.e.*, in industrial operations where the products were to be sold to the federal government. Under the law, contractors for all such materials and supplies, if valued at more than \$10,000, were required (1) to pay the prevailing wages in their locality for all labor utilized in performance of the contract; (2) not to permit workers to labor more than eight hours a day or forty hours a week; (3) not to employ any boy under sixteen, or girl under eighteen, years of age, nor any convict labor; and (4) to allow no part of any contract to be carried out under insanitary or unsafe conditions. For violation of any of these provisions, a contractor might be barred for three years from receiving further government orders. Under the stress of a global war, it has not been possible to maintain these standards at all points in the past few years, but it is safe to assume that they will later be revived in full force.

The
"Little
N.R.A."
(1936)

2. The
Securi-
ties Act
(1933)

Unlike the Recovery Act, which, after all, was designed to be of only temporary duration, the Securities Act of 1933 and the Securities Exchange Act of 1934 were intended to be permanent additions to the long line of regulatory laws enacted under the commerce clause; unlike the Recovery Act, too, they met with no reversal at the hands of the courts. As indicated by the titles, both have to do with the offering for sale and the buying and selling of stocks, bonds, debentures, and other securities. A contributing cause of the depression had unquestionably been the unloading upon the public of worthless securities through misrepresentation and fraud—a "traffic in the economic and social welfare of our people" (as President Roosevelt characterized it) which previously had been subject only to the varying and ineffective regulations found in the

¹ The National Recovery Administration was continued in a skeleton form until January 1, 1936, to serve as a fact-finding or industrial research body, and after its dissolution the President created a Committee of Industrial Analysis to survey the entire experience. The resulting report, reviewing objectives, successes, failures, and legal aspects, will be found in *Report of the President's Committee of Industrial Analysis* (Washington, 1937), summarized in *N. Y. Times*, Mar. 3, 1937.

² See pp. 607-610 below.

³ 49 *U. S. Stat. at Large*, 2036. See p. 611, note 2, below.

"blue-sky laws" of the several states; and the depression brought home forcibly the necessity for stricter and more uniform regulation by national authority.¹ The basic purpose of the Securities Act² is to insure that investors shall be given full and accurate knowledge of the facts surrounding the issuance of securities offered for sale in interstate commerce, to the end that the public may be protected against unscrupulous, high-pressure salesmanship and no longer exploited through the distribution of fraudulent and worthless securities. To the ancient rule of *caveat emptor*—"let the buyer beware"—is added the complementary admonition, "let the seller also beware." In a word, the burden of telling the truth is placed squarely upon the seller.³

Thus it is made a penal offense to sell or offer for sale in interstate commerce or through the mails any security which has not been authorized, originally by the Federal Trade Commission, but since 1934 by the Securities and Exchange Commission mentioned below, the agency now charged with enforcement of the act. Even more effective as a restraint is a provision imposing a heavy civil liability upon a corporation, including its directors and principal financial officers, for any untrue or only partly true declaration of a material fact in the "registration statement" and prospectus filed with the Commission. It is not the business of the Commission to pass upon the value of a security or upon the soundness of the company issuing it; and no statement by the Commission is to be construed as an endorsement or approval of any security or of any company. The agency's only function is to see that complete and accurate information concerning a security is made available to the public, that the security is truthfully presented to prospective purchasers, and that no fraud is practiced in connection with sales.⁴

The logical complement of the act just described is found in the Securities Exchange Act of 1934.⁵ A large proportion—perhaps the major part—of the securities affected by the Securities Act of 1933 are bought and sold on the stock exchanges that are found in practically all of our more important cities, the largest and best known being that in New York. Transactions in securities in these markets were formerly subject to little more in the way of regulation than the few restrictions which the exchanges themselves saw fit to impose upon their members, and these provided little protection for the investing public. As a consequence,

Insuring
truthful-
ness con-
cerning
securi-
ties

3. The
Securi-
ties Ex-
change
Act
(1934)

¹ Losses from this source were estimated in 1933 to have aggregated twenty-five billion dollars in the preceding ten years, or about \$250 for every man, woman, and child in the United States. 73rd Cong., 1st Sess., Sen. Rep. No. 17, p. 2 (1933).

² 48 U. S. Stat. at Large, 74.

³ Excepted from the provisions of the act are securities issued by the national, state, and local governments, by national and state banks, by religious, educational, and other corporations not organized for profit, by railroads and other common carriers, and by building and loan associations.

⁴ C. C. Rohlfsing *et al.*, *Business and Government* (4th ed.), Chap. VII; *Cong. Digest* [Symposium], XIII, 136-156 (May, 1934), "The Federal Securities Act of 1933." Cf. "Three Years of the Securities Act," *Law and Contemporary Problems*, IV, Nos. 1-2 (1937).

⁵ 48 U. S. Stat. at Large, 881.

unsavory and dishonest practices grew up—"wash sales," matched orders, "rigging the market," "jiggles," pools, and other manipulations—by which prices were pushed up or forced down for the benefit of certain insiders, and innocent investors were led like lambs to the slaughter. Speculation "on margin," too, reached scandalous proportions and threatened seriously to impair the national credit structure.

To remedy this situation, Congress in 1934 passed the Securities Exchange Act, which for the first time established national control—through a Securities and Exchange Commission of five members, appointed by the president and Senate—over all stock exchanges engaged in interstate commerce. The transactions of such exchanges are declared to be "affected with a national public interest" which makes it necessary to provide for their regulation and control "in order to protect interstate commerce, the national credit, the federal taxing power, to make more effective the national banking system and the federal reserve system, and to insure the maintenance of fair and honest markets in such transactions." In other words, the main objectives of the act are (1) to prevent manipulators from befuddling and fooling the public, to emancipate exchanges from the pernicious operations and practices of the past, and thus to make them fair and open market-places for investors and not rendezvous for speculating conspirators; (2) to afford public information as to the character of securities bought and sold upon the exchanges; and (3) to provide some adequate instrument for the control of credit for speculative purposes. One will not be so naïve as to suppose that all stock-market practices will henceforth be beyond reproach. Exceedingly timely and useful safeguards have, however, been supplied.¹

4. Com-
modities
Exchange
Act
(1936)

Based also upon the commerce power is the Commodities Exchange Act of 1936,² which seeks to prevent and remove obstructions upon interstate commerce arising from market manipulation and excessive speculation upon exchanges dealing in agricultural commodities. A Commodity Exchange Commission³ is clothed with large discretionary authority over exchanges trading in wheat, cotton, rice, corn, and other grains,

¹ On the struggle over the reorganization of the New York Stock Exchange, see J. Alsop and R. Kintner, "The Battle of the Market-Place," *Sat. Eve. Post*, CCX, June 11, 1938, p. 5 ff.; June 25, 1938, p. 10 ff.

The powers of the Securities Exchange Commission have been increased by successive acts of Congress, until it now (1945) administers four important statutes in addition to the two mentioned in the text: the Public Utility Holding Company Act of 1935 (see p. 559 below), the Trust Indenture Act of 1939 (53 *U. S. Stat. at Large*, 1149), the Investment Company Act of 1940, and the Investment Advisers Act of 1940 (54 *ibid.*, 789, 887). See M. Fainsod and L. Gordon, *Government and the American Economy*, Chap. xii; E. Stein, *Government and the Investor* (New York, 1941); B. Shaw, "Investigation Powers of Federal Commissioners—the Securities Exchange Commission," *Mich. Law Rev.*, XXXVI, 780-801 (Mar., 1938); H. V. Cherrington, *The Investor and the Securities Act* (Washington, 1942); J. Frank, *If Men Were Angels* (New York, 1942).

² 49 *U. S. Stat. at Large*, 1941. This act was in form an amendment of the Grain Futures Act of 1922 (42 *U. S. Stat. at Large*, 998).

³ Consisting of the secretaries of agriculture and commerce and the attorney-general, acting *ex officio*. The act is administered directly by a Commodity Exchange Administration in the Department of Agriculture.

butter, eggs, and similar commodities; and the commissioners are empowered to fix the limits to "futures" trading and to speculative trading done by any one person upon exchanges, to curb excessive speculation and market manipulation, and, in general, to set up trading rules and fair trade practices.¹

A problem of growing importance in later years has been that of the public utility "holding company"—a corporation chartered in some particular state, holding the majority stock in operating companies scattered perhaps all over the country, and able, as matters formerly stood, to evade any great amount of regulation, and therefore to indulge in shady practices of many descriptions. Some of the abuses, indeed, which the Securities Act and the Securities Exchange Act were designed to remedy attained their greatest seriousness in connection with the marketing and distribution, through stock exchanges, of the securities of such holding companies. To deal with the matter, Congress, in 1935, passed a momentous measure under two "titles," one a Public Utility Holding Company Act and the other a Federal Power Act.² In the first portion of the statute, the Securities and Exchange Commission is given jurisdiction over holding companies engaged in the production of gas and electricity³ and either participating in interstate commerce or making use of the United States mails—which, manifestly, means virtually all of them. All holding companies have been forced to register with the Commission, and to file with it a registration statement giving full information concerning the company itself and its subsidiaries; securities can be issued and property acquired only with the Commission's consent; other sorts of transactions, too, must have similar sanction.⁴ In these and other ways too numerous to mention, the national government has been given substantially the same control over public utility holding companies that state authorities have for years been exercising over operating companies. If President Roosevelt could have had his way, all such holding companies would have been doomed to extinction. Conviction, however, that a holding company may be both legitimate and socially useful, reinforced by large-scale lobbying by the interests concerned, influenced Congress to reject the drastic "death sentence" clauses of the original bill and to go no farther than to stipulate that after January 1, 1938, the operations of a holding company should be confined to a single integrated utility system, so as to be easier to inspect and control. In pursuance of this provision, and under the vigilant supervision of the Federal Power Com-

4. The
Public
Utility
Holding
Company
Act
(1935)

¹ Commission merchants and brokers are required to register with the secretary of agriculture; exchange officials must report periodically to the Commission; and warehouses where commodities are stored, and their records, must be open to inspection by government officials. The Commission may suspend for six months trading on any exchange which fails to obey the law.

² 49 U. S. Stat. at Large, 803.

³ Except such as hold less than ten per cent. of the stock of any subsidiary.

⁴ The regulation of rates, facilities, and business practices of electric and gas companies doing an interstate business has been vested in the Federal Power Commission, dating from 1930. See p. 539 above and pp. 593-594 below.

mission, a number of large holding companies, such as Associated Gas and Electric and Electric Bond and Share, have in recent years been divesting themselves of operating companies and connections held not to be appropriate elements in an integrated system.¹

The Government and Business in Wartime

Some developments after 1940

The new system of increased control by government over business as outlined in the preceding pages was hardly in full operation before the country turned to the stupendous defense and war effort of 1940 and after; and there is hardly a business establishment or operation that has not been affected, often indeed transformed, by subsequent developments. The great objective throughout has been "economic mobilization," with the prevention, or at all events the curbing, of inflation coming in, by 1942, as an objective of hardly secondary importance; and the means employed have ranged all the way from encouragement of voluntary effort to the imposition of the most rigid and far-reaching controls. At the outset, the problem was chiefly one of stimulating the production of materials needed by the Army and Navy. Even this soon entailed a scheme of priorities compelling producers to give right of way to Army and Navy orders as against orders from private dealers or consumers; also arrangements for allocation, under presidential order, of goods and materials, so as to avert shortages and keep essential industries going at top speed. Before long, prices began going up; and an Office of Price Stabilization and Civilian Supply (renamed in August, 1941, Office of Price Administration) was set the task of preventing price spiraling and checking inflation, with power to determine fair and reasonable maximum prices, *i.e.*, price "ceilings."² An executive order of August, 1941, introduced a system of control over the huge instalment credit business carried on through the nation's banks, stores, and personal finance companies. As early as June, 1940, the Navy Department was authorized to take over and operate private plants when unable to come to agreement with the managers on defense contracts; and the power to requisition (with compensation, of course) both plants and materials was extended by stages until by October, 1941, the president had authority to take over any military or naval equipment or the machinery, tools, or materials necessary for the manufacture or operation of such equipment, provided such articles were needed for the country's defense and could not be obtained otherwise. On the basis of authority somewhat indirect, but none the less effective, the entire automobile industry was asked in

¹ See L. S. Lesser, "Constitutional Powers of the Securities Exchange Commission Over Public Utility Holding Companies," *Geo. Washington Law Rev.*, VIII, 1128-1147 (June, 1940); J. F. Davisson, "Death Sentences for Public Utility Holding Companies," *ibid.*, VIII, 1148-1164 (June, 1940).

² In May, 1942, a general "price-freezing" plan went into operation, with the highest prices of the preceding March serving as a ceiling. In the following October, the O.P.A. became a unit in the newly created Office of Economic Stabilization within the capacious Office for Emergency Management. See p. 687 below.

January, 1942, to turn all of its resources to the production of war materials; a month later, the radio-manufacturing industry was given three months in which to do the same thing; and by rapid stages practically all other consumers' durable-goods industries were similarly put in process of "conversion." From this, it was but a step to rationing of retail sales to consumers. Even in 1941, gasoline was rationed to dealers; and in 1942 it was rationed to consumers (first in seventeen Eastern states, and later throughout the entire country), while new cars, new tires, and sugar, and eventually numerous other commodities, were rationed the country over. Shortage of plant capacity became a problem also, and gradually the government was drawn into financing plant expansion, with a total authorized expenditure of more than eight and one-half billion dollars by the summer of 1942.

These are merely a few of the many ways in which government and business were rapidly brought into new or altered relations by the national emergency.¹ By 1944, with the end of the war approaching, attention was beginning to be turned actively to the staggering problem of "reconversion," i.e., to the methods and procedures to be followed in turning industry back into its normal channels and loosening the iron grip of wartime government upon the country's business. No one was so naïve as to suppose that everything could be put back where it was in 1940. Undoubtedly the road for free enterprise would be widened again, and many controls would be relaxed or entirely terminated; indeed, it was possible that powerful demand in influential quarters would lead to a general and decided swing in that direction. Almost equally certain was it, however, that from the total wartime experience would, in the long run, emerge permanent relationships between government and business broader and deeper than even those described above as characteristic of the New Deal era of dynamic regulation.

The emerging problem of "reconversion"

Ownership and Operation by the Federal Government

So strong has been the tradition of private initiative and management in American business that governments, whether national, state, or local, have, in normal times, invaded the field far less extensively than in a number of European countries. Various states, however—notably North Dakota—have engaged in undertakings of a business nature, and, as is well known, numerous municipalities nowadays own and operate water-works, electric light plants, gas plants, street railways, airports, bridges, tunnels, and other utilities. From the earliest days, the national government has conducted what has come to be one of the world's largest businesses, i.e., the postal system. In early times, too, it established trading posts and set up the first and the second Bank of the United States. Later on, it aided in the building of railroads and canals, undertook irrigation and other reclamation projects, and eventually constructed and operated

Different forms taken

¹ Cf. Chap. xxxv below.

(as it does today) the Alaska Railroad and the Panama Canal. During the first World War, it built and operated merchant ships and took over temporarily the management of all railroads and all means of electrical transmission of intelligence. Long after the restoration of peace, it operated a fleet of ocean-going vessels originally built for use during the war, and to this day a government-owned and fully self-supporting Inland Waterways Corporation in the Department of Commerce, dating from 1924, carries on a transportation business on the Mississippi and other inland waterways which competes directly with railroads and other privately owned transportation enterprises. Two radio systems are government-owned and operated, one by the Army and the other by the Navy; and the largest printing establishment in the world is the Government Printing Office at Washington. Even in peacetime, federal plants manufacture munitions and other supplies used by the Army and Navy; while in the early stages of the present war, munitions works were constructed on a vast scale, mostly for private operation under contract.¹

From the lengthy list of such activities, only one can be singled out for comment here—the oldest and in the long run the most important, i.e., the postal service.

The
postal
service:
Constitu-
tional
basis

So intimate is the connection between the postal service and commerce that, had the constitution been entirely silent on postal matters, Congress might easily have established a postal system under powers implied in the commerce clause. One finds, however, in the list of powers expressly conferred on Congress that of establishing "post-offices and post-roads";² and the only serious constitutional issue which has ever arisen in connection with the subject has been that of whether, as strict constructionists for a good while contended, the power conferred extended only to designating which of existing routes should be used for transmission of the mails, or whether, as broad constructionists argued, it included the right to build and operate roads especially designed for the purpose. As has usually happened, the more liberal interpretation prevailed, and in later decades the improvement of the postal service has repeatedly been employed as a justification for federal aid to highway construction and development of airlines, even within individual states.

¹ Under the New Deal, and during the present war, the device of the government-owned corporation has come into extensive use. Before World War I, the Alaska Railroad and the Panama Canal were the only examples; during that war, six new establishments of the kind were created; from then until 1933, four (including the Inland Waterways Corporation) made their appearance; by 1943, the number in existence was approximately thirty. On two of the most notable ones—the Reconstruction Finance Corporation and the Tennessee Valley Authority—see pp. 521-522 above and 594-596 below, respectively. On the general subject, see M. Fainsod and L. Gordon, *Government and the American Economy* (New York, 1941), Chap. xix; D. E. Lilienthal and R. H. Marquis, "The Conduct of Business Enterprises by the Federal Government," *Harvard Law Rev.*, L, 545-601 (Feb., 1941); C. H. Pritchett, "Government Corporations in the United States," *Southwestern Soc. Sci. Quar.*, XIX, 189-200 (Sept., 1938); H. Pinney, "The Legal Status of Federal Government Corporations," *Calif. Law Rev.*, XXVII, 712-736 (Sept., 1938); and J. McDiarmid, *Government Corporations and Federal Funds* (Chicago, 1938).

² Art. I, § 8, cl. 7.

Although nation-wide postal establishments operated by government authorities do not go back very far historically, the services rendered by such agencies are nowadays considered prime necessities; and the postal system of the United States has become, not only the most extensive in the world, but probably the largest single business enterprise in which any government has ever been directly concerned.¹ Indeed, a person desiring to portray the amazing development of the United States in the past hundred and fifty years could hardly do so more effectively than in terms of the postal system. He could cite the 43,023 post-offices and 32,170 rural delivery routes in operation on July 1, 1943, the latter serving nearly thirty million people; the receipts of \$966,227,288 in 1943, compared with \$280,000 in 1800; the million and a quarter letters mailed every hour of the day, from one end of the year to the other; the thirty-three billion pieces of mail handled in a year; the 237,000 employees, comprising approximately eight per cent of the entire executive civil service in 1943, but nearly thirty per cent in prewar days. But even more striking would be the facts relating to the expansion of functions and activities which has made the Post-Office the service whose operations come closest home to the great mass of the people. High points in the recital would be the introduction of the registration system in 1855, the beginning of urban free delivery in 1863, the establishment of the money-order system in 1864, the beginning of rural free delivery in 1896, the introduction of the postal-savings system in 1911, the starting of the parcel-post system in 1913, and the launching of an air-mail service—later extended to a number of foreign countries—in 1918.²

Present
magni-
tude

Growth
of the
service

By all odds the most noteworthy among postal developments of the past quarter-century has been the building up of the air-mail service. After considerable study and a number of occasional flights with mail by exhibition aviators, a regular service between Washington and New York was opened experimentally in 1918. In 1919, this was extended to include New York-to-Cleveland and Cleveland-to-Chicago routes; in 1920, increased appropriations permitted extensions *via* Chicago to Minneapolis, Omaha, St. Louis, and eventually (1924) San Francisco; and, in response to steadily growing public demand, other lines were opened in succeeding years, until by 1943 mail was being carried over a domestic airways network of 45,304 miles. In 1927, the postal authorities began letting air-mail

The
air-mail
service

¹ Benjamin Franklin laid the foundations of our postal system when deputy postmaster-general of the colonies during the twenty years before the Revolution, and also postmaster-general in 1775-76. The Post-Office Department, by which the present system is administered, came into existence in a roundabout way. It was not recognized by statute as a coordinate executive department until 1874. But to all intents and purposes it enjoyed that status from 1825, when the term "post-office department" was first used in the title of an act of Congress; and even more definitely from 1829, when, on the initiative of President Jackson, the postmaster-general became a member of the cabinet.

² For details on the postal-savings system and the parcel post, see 7th ed. of this book (1942), pp. 570-571, and especially the annual reports of the postmaster-general. On the job of organizing and enlarging mail facilities for our armed forces, see *Annual Report of the Postmaster-General* (1942), 3-6; *ibid.* (1943), 2-4.

contracts to private commercial corporations, just as they had long contracted with railroads and steamship lines for the transportation of mail matter on land and sea; and whereas railroads have been supposed to be paid no more than their services are worth, air carriers were deliberately subsidized as a method of encouraging the development of air transportation—a policy long pursued also in connection with contracts with American steamship lines. In 1934, an experiment with employment of Army aviators failed to yield satisfactory results, and the contract system was revived, although at less than the previous cost.¹

Departmental
organiza-
tion

The Post-Office Department is administered by a postmaster-general, who, for obvious reasons, is often selected with a view to his experience in managing a great business, *e.g.*, John Wanamaker; or, at all events, in conducting large enterprises, not excluding, as in the case of Will H. Hays and James A. Farley, national political campaigns.² Each of four assistant postmasters-general has charge of a branch of the Department, which in turn is organized in divisions under superintendents or chiefs; and there are other general departmental officers, including a budget commissioner, a solicitor, a comptroller, and a purchasing agent. The bulk of the Department's work is done, of course, throughout the country, in collecting, assorting, transporting, and delivering mail (including parcels of merchandise), receiving and caring for savings, transferring money under the money-order system, and enforcing the laws against lottery schemes and swindlers. Expansion of rural delivery service has made possible the abandonment of thousands of small post-offices. Nevertheless, as indicated above, the total number on June 30, 1943, was 43,023.³ These are divided into four classes, the first three according to annual receipts, the fourth including all where the postmaster's salary does not exceed \$1,100 a year, *i.e.*, about seventy per cent of the total.⁴

The prob-
lem of
deficits

There was a time when the postal establishment was looked upon as an agency that should yield the government a net profit. All notions of this sort, however, were long ago given up. For a hundred years, the most that was attempted was to make the service pay its way, and during long stretches of time—indeed, almost continuously between 1830 and 1910—it failed to do even that. When the United States entered World War I in 1917, postal rates were, indeed, deliberately pushed up to such a level as to yield the government a clear profit. But they were lowered again, in 1919, as soon as the emergency passed; and deficits promptly reappeared, continuing uninterruptedly until fiscal 1943. In

¹ G. Goodman, *Government Policy Toward Commercial Aviation* (New York, 1944), Chaps. v, vi, viii; P. T. Davis, *The Economics of Air-Mail Transportation* (Washington, D. C., 1934); F. A. Spencer, *Air-Mail Payment and the Government* (Washington, D. C., 1941).

² The political side of the postmaster-generalship is portrayed interestingly in D. C. Fowler, *The Cabinet Politician; The Postmaster-General, 1829-1909* (New York, 1943).

³ The maximum number, reached in 1901, was 76,945.

⁴ On the appointment of postmasters under the merit system, see p. 426, note 1, above.

the year mentioned—for the first time in a quarter of a century—expenditures were well within revenues; indeed a surplus of \$1,334,551 was shown—the reason being, not general increases in postal rates as during the previous war, but simply the enormously increased postal business (in areas where the business is most profitable) incident to World War. II.¹

The reasons for recurring deficits in peacetime are not difficult to discover. One is the heavy expense of handling and transporting vast quantities of printed matter for the entire federal establishment—all going, of course, postage free.² Another is the necessity of maintaining service over large rural areas where the costs entailed are bound to be out of all proportion to the returns. A third is the overpayment—from a purely business point of view—of air carriers. A fourth is increases of pay of postal employees and reductions in hours of service. Finally may be mentioned deliberate sacrifices of income entailed by legislation authorizing especially low rates on educational, scientific, religious, and fraternal publications, free distribution of country newspapers within the county of publication, and free carriage of books, pamphlets, and other reading matter in raised characters for the use of the blind.

Some of the policies enumerated are aimed at promoting the public well-being, and on that ground, may be, and probably are, defensible. A business run on such lines, cannot, however, be expected to make ends meet; and while something can be gained permanently by economies and by further increases of postal rates, it may be doubted whether a government service of the nature of the postal establishment, in a country of continental proportions, really ought to be expected to pay its way in the literal sense of bringing in as much in dollars and cents as is spent on it. Such expectation would be reasonable only if the Post-Office were purely a business institution, free to cut off—as a private corporation would be likely to do—any branch or service proving incapable of being made self-sustaining. A postal service ministering to a twentieth-century civilization cannot, however, be conducted on the plan of a chain store or a motor plant.

Reasons
for them

A business that
cannot be
expected
to pay

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¹ This is further illustrated by the tapering off of deficits from \$42,225,000 in 1940 to \$24,663,000 in 1941 and \$14,139,000 in 1942.

² Mail covered by the franking privilege of members of Congress is a related item, but not so large as is commonly supposed. In 1942, when it cost the Post-Office Department upwards of seventy million dollars to handle the materials mentioned above, the outlay on congressional franked mail was only \$767,000. Cf. E. Stern, *History of the Free Franking of Mail in the United States* (New York, 1936).

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CHAPTER XXIX

ASSISTANCE TO AGRICULTURE

The federal constitution makes no mention of agriculture. But no more does it speak specifically of industry and labor; and although by tradition the most highly individualistic form of enterprise in which our people have engaged, agriculture, like both industry and labor, has turned to the halls of government for encouragement and protection. Nor has the quest been in vain. A hundred years ago and more, state legislatures were passing laws and making appropriations for the benefit of the farmer; and this they continue to do. Nearly every state has a department or board of agriculture endowed with substantial administrative powers as well as with general advisory and educational functions. Beginning, however, with proposals heard as early as Washington's first administration, and steadily gaining momentum as agricultural activities, interests, and problems took on more of a national, and eventually international, aspect, the conviction grew that primary responsibility for ministering to the needs of agriculture in a large and coherent way rests with the federal government; and a systematic account of all the things that have been done in Washington and throughout the country to meet this responsibility in the past three-quarters of a century—and particularly since 1933—would fill a book.¹ Before the present global war, the story seemed, in a sense, that of a job done too well—of an agricultural system nurtured and developed to a point where it was considerably in advance of the capacity of a not too prosperous country (and world) to absorb its product. The war has changed all this (at least for a time), sharply stimulating the demand for agricultural products, both for consumption at home and for shipment, under "lend-lease" arrangements and otherwise, to allied nations; we have ourselves been obliged to import foodstuffs; and a hungry world—already drawing upon us²—will have to be fed in no small part by the American farmer for years after the fighting ceases. In this altered situation, production does not seem to have been at all over-stimulated. In any event, the story of our agricultural development is that of a task only fairly begun, in that the great problems of adjustment of production to consumption, of stabilization of farm income, of land use, of soil erosion, of farm tenancy, of resettlement of

Growing
responsi-
bility
of the
federal
govern-
ment

¹ Such a book, indeed (or the closest approach to it), is J. M. Gaus and L. Wolcott, *Public Administration and the United States Department of Agriculture* (Chicago, 1940).

² Particularly through the medium of the United Nations Relief and Rehabilitation Administration.

The Department of Agriculture: some special features

handicapped rural populations, of rural electrification, and the like, will still be with us after peace returns.

If problems such as these have not been solved, it is not for lack of an impressive executive department at Washington to give attention to them; for the Department of Agriculture is not only one of the largest government establishments in the world, but one of the best organized and conducted, and one of the most intelligent. It was not by chance that the same year (1862) which saw the Morrill Act¹ and the Homestead Act² placed on the federal statute-book yielded also a third statute creating a "department of agriculture"; and although for a time the new agency was only a unit within the Department of the Interior and presided over merely by a commissioner, pressure from increasingly vocal agricultural interests finally, in 1889, influenced Congress to raise it to coördinate rank with the seven executive departments then existing—agriculture thus becoming the first great occupational interest to win a seat in the cabinet. The story of the Department in these last fifty or sixty years has been not simply one of swiftly multiplying functions and activities and rapidly growing personnel—aspects that will come to view as we proceed. It has been a record also of systematic, persistent, and fruitful research, making the Department today an outstanding example of useful association of science and government. By the same token, it has been a record of greater freedom from partisan influences than perhaps can be shown by any of the other nine departments. The student of administration finds it a record notable, too, because of the superior personnel methods in which the Department pioneered and in which it is still ahead of others, because of a system of in-service training enlisting in a departmental graduate school as many as two thousand employees at a time, and because of the general soundness of budgetary practices pursued, notwithstanding a tendency of some of the newer peacetime agencies to magnify their own importance and add unwisely to Department costs. In its relations with Congress, the Department operates amid a maze of pressure groups and blocs, often largely conditioning one or another of its activities. It also has significant relations with state and local governments.³

Production and Marketing

Encouragement of production

As a factor in an increasingly complex national economy, agriculture has developed in such a manner that the farmer normally finds himself confronted with three main sets of problems, pertaining respectively to (1) production, (2) marketing, and (3) credit. On the production side

¹ See p. 570 above.

² See p. 536 below.

³ On the Department's historical development, see H. B. Learned, *The President's Cabinet* (New Haven, 1912), Chap. xi, and J. M. Gaus and L. Wolcott, *op. cit.* Chaps. i-v. A full picture of present departmental organization and functions will be found in any recent issue of the *U. S. Government Manual*.

many restrictions were imposed before the war with a view to curbing surpluses and maintaining prices. Generally, however, the objective has been the encouragement of production; and—aside from making arable land available and safeguarding the American market by means of protective tariffs—the two principal methods employed over the years have been scientific research and aid to agricultural education.

The medium through which research of direct significance to agriculture is carried on is mainly a series of bureaus and services in the Department of Agriculture. The earliest function of the Department was, indeed, scientific investigation and dissemination of the information gained therefrom; and notwithstanding later multiplication of activities in other directions, the Department is still by all odds the greatest research establishment of its kind in the world.¹ Of bureaus devoted particularly to investigation, seven of principal importance have to do with (1) agricultural and industrial chemistry, (2) animal industry, (3) dairy industry, (4) entomology and plant quarantine, (5) plant industry, soils, and agricultural engineering, (6) human nutrition and home economics, and (7) agricultural economics.² From these terms, one can easily deduce the general nature of the inquiries and experiments conducted by the various agencies, even though only an expert can completely understand and appreciate the technical procedures and objectives frequently involved. Still other units devoted not quite so exclusively to research, yet continually carrying on studies of significance, include (1) a Forest Service, which not only investigates forestry problems, but takes care of as many as 160 national forests (comprising over 176,000,000 acres) in thirty-three states and territories, and shares responsibility with the Land Office and the Reclamation Service in the Department of the Interior for carrying out and extending the national conservation program gradually developed since 1900;³ (2) a Soil Conservation Service; (3) an Extension Service; and (4) an Office of Experiment Stations.

The object of the investigative activities of the foregoing agencies is practical assistance to farmers; and this necessitates facilities for popularizing the results obtained. Much information, of course, is conveyed directly through the medium of widely distributed bulletins, reports, and

1. By scientific research

2. By agricultural education

¹ Its staff contains more persons of scholarly attainment, and fewer appointed for political reasons, than that of any other of the departments. For a detailed study of it, see J. M. Gaus and L. Wolcott, *op. cit.*, Chap. xv.

² Good summaries of the work of these bureaus will be found in any recent issue of the *U. S. Government Manual*. Detailed treatises (although out of date, and not always dealing with units as at present constituted) include G. A. Weber, "The Bureau of Chemistry and Soils," *Service Monographs* (Baltimore, 1928); F. W. Powell, "The Bureau of Plant Industry," *ibid.*, No. 47 (Baltimore, 1927), and "The Bureau of Animal Industry," No. 41 (Baltimore, 1927); J. Cameron, "The Bureau of Dairy Industry," *ibid.*, No. 55 (Baltimore, 1929); and P. V. Betters, "The Bureau of Home Economics," *ibid.*, No. 62 (Washington, 1930). The first six bureaus above named are grouped in a departmental division known as the Agricultural Research Administration; the seventh, which is the Department's central statistical and economic research agency, is located in a more or less temporary division known as the Department of Agriculture and War Food Administration.

³ See pp. 587-588 below.

other printed documents. In these days of radio broadcasting, a good deal—notably such matters of immediate concern as market reports and weather predictions—is put on the air.¹ But the federal government, in common with most of the state governments, has also committed itself to an ever-widening program of agricultural education in the stricter sense of the term. To begin with, the Morrill Act of 1862 and certain supplementary legislation bestowed upon the states, in proportion to their representation in Congress, some 10,840,000 acres of public land, under the condition that the proceeds thereof be used in each case to maintain one or more colleges devoted primarily (although other subjects might be taught) to instruction in “such branches of learning as are related to agriculture and the mechanic arts.”² From this arrangement arose the “land-grant colleges” which dot the country today—in many states, *e.g.*, Indiana, Iowa, and Michigan, separate “agricultural and mechanical” colleges, in others, *e.g.*, Illinois, Wisconsin, and Minnesota, colleges forming divisions of the state university. Some states parted with their lands at absurdly low prices, and in 1890 a generous Congress started the practice—ever since maintained—of making direct appropriations from the federal treasury for additional aid to the institutions that had grown up. Simultaneously, Congress instructed the Department of the Interior to see that the colleges were carrying out the purposes for which the grants were made; and out of this has developed a substantial amount of federal control over curricula and other features.

In such a domain as agriculture, research involves experimentation; and not only are first-hand investigations carried on at Washington, but as long ago as 1887 every land-grant college was required to maintain an experiment station, devoted particularly to inquiries conducted with respect to the conditions of climate, soil, and markets of the region adjacent to the given station.³ Various forms of extension work are carried on also, with a view to bringing information directly to the farmer and his wife in their home; indeed, every one of the agricultural colleges now maintains a distinct division for the conduct of such work in both agriculture and home economics.⁴

The problem of marketing becomes acute

Having shown the farmer how to “make two blades of grass grow where one grew before” and how to raise livestock more efficiently, the government found that it had created for itself a new and even greater problem. More farmers now had produce to sell; more had come to be dependent upon receipts from “cash crops”; any obstruction to the trans-

¹ T. S. Harding, “Informational Techniques of the Department of Agriculture,” *Pub. Opinion Quar.*, I, 83-96 (Jan., 1937).

² 12 *U. S. Stat. at Large*, 503. Beginning with Ohio in 1802, Congress had been accustomed to grant public land to incoming states, to be used for educational purposes generally. See p. 586 above.

³ M. Conover, “The Office of Experiment Stations,” *Service Monographs*, No. 32 (Baltimore, 1924).

⁴ A plea for more effective coöperation between the Department of Agriculture and the land-grant colleges will be found in H. C. Byrd, “Needed—Unity in Agriculture,” *State Government*, XVII, 280-283 (Feb., 1944).

portation of commodities to distant markets, or to the handling of such commodities in the increasingly intricate processes by which they reached the consumer—any piling up of surpluses and depression of prices—was of deep concern. And when difficulties at these points began to multiply, the farmer turned to his government for aid, especially in developing markets, sustaining prices, and minimizing the effects of market manipulations engaged in by speculators and others for their own advantage. Down to 1929, such assistance took the form, chiefly, of (1) furnishing full, exact, and up-to-the-minute information concerning crop and marketing conditions and prospects, both at home and abroad; (2) establishing and maintaining uniform grades and standards for commodities handled through the channels of interstate and foreign commerce; (3) regulating bonded warehouses and stockyards, licensing commission merchants, brokers, and others who handled or dealt in perishable farm products, and in other ways protecting the producer against discrimination and fraud; and (4) protecting him against the operations of speculators dealing in “futures,” *i.e.*, engaging to deliver stipulated quantities of a given commodity on a given date at a given price, and depending for profit upon forcing down the buying price—the price received by the farmer—in the meantime. All measures taken on these lines, however, failed to yield farmers as a class a proportionate share of the prosperity which the country considered itself to be enjoying in the period 1921-29; and a comprehensive Agricultural Marketing Act of the last-mentioned year, designed to reënforce the earlier measures and carry them farther, through the instrumentality of a Federal Farm Board amply equipped with both powers and money, brought no better results. Thus the problem was no new one when the Roosevelt Administration took it over, in a period of dire distress for not only agriculture but industry and business as well.

The National Recovery Act of 1933, dealt with in the preceding chapter, was designed primarily to stimulate revival of trade and industry. Not only, however, did agriculture stand in at least equal need of assistance, but without improvement of its status commercial and industrial revival could not go far. Accordingly, under impetus supplied by the newly installed Administration, Congress—invited by the President to enter “a new and untrod path”—bracketed with the Recovery Act an Agricultural Adjustment Act designed to benefit the farmer through crop curtailment and marketing regulations.

The new legislation had various objectives, but its basic aim was clear and simple, *i.e.*, to increase the farmer's purchasing power by raising the prices which he received for his products—prices which at the time were so depressed by accumulated surpluses that frequently they did not even cover the cost of production. More specifically, the goal was “parity,” that is, a price level at which farm products would have the same purchasing power as in the arbitrarily selected but favorable base

The first
Agricultural
Adjustment
Act
(1933)

1. Gen-
eral
purport

period, 1909-14.¹ To achieve this, the farmer was to be helped to plan his production to fit the demands of existing markets, thereby avoiding unsalable surpluses; and it seemed necessary likewise to extend control over people engaged in "processing" agricultural commodities, *i.e.*, preparing them for use, and over traders in such commodities as well. Asserting that the depressed condition of agriculture had "burdened and obstructed the normal currents of commerce" in farm products, the authors of the act sought to give their handiwork a valid constitutional foundation by putting it forth as a measure by which such burdens and obstructions were to be removed.

2. Crop
produc-
tion
features

The task of carrying out the policies embodied in the act was assigned to the appropriate executive department—more specifically, to the secretary of agriculture,² to whom was given unprecedented authority to reduce the market supply of basic agricultural commodities and to regulate the marketing of all such products. One major feature was the effort to restrict production—an end to be attained chiefly by the novel means of voluntary agreements by farmers to reduce acreage planted, to plow under a percentage of crops already growing, to kill surplus pigs, and otherwise to curtail their output of marketable commodities. Compensation was provided in the form of cash bounties or subsidies paid to farmers in varying stipulated proportions; and funds for the purpose were to be secured largely from "processing taxes" levied upon manufacturers of cotton goods, millers, meat-packers, and other processors of agricultural products to which the terms of the act applied³—the taxes, in turn, being passed along in the form of higher prices to consumers. In June, 1934, when the act had been in operation one year, the national administrator testified that three million farmers, having concluded that they at least had nothing to lose, had signed production-control contracts for curtailing output, thereby withdrawing from surplus production about forty million acres; that the farmer's cash income, including benefit payments, had risen by thirty-nine per cent; and that the buying power of farm commodities had improved by twenty per cent.⁴

2. Mar-
keting
arrange-
ments

Along with production, the act dealt also with marketing; and here, too, the secretary of agriculture was endowed with new and sweeping authority, *i.e.*, to enter into marketing agreements with processors and others engaged in handling *any* agricultural commodity "in the current of interstate or foreign commerce"—and the making of such agreements was

¹ In the case of tobacco, the base period was August, 1919, to July, 1929. See J. D. Black, *Parity, Parity, Parity* (Cambridge, Mass., 1942).

² For the purpose, an Agricultural Adjustment Administration was organized in the Department, but on a largely autonomous basis.

³ Originally seven, *i.e.*, wheat, cotton, field corn, rice, tobacco, hogs, and milk and its products. Later additions were beef and dairy cattle, peanuts, rye, barley, flax, grain sorghums, sugar beets, sugar cane, and potatoes.

⁴ C. C. Davis, "One Year of the A.A.A.," *N. Y. Times*, June 4, 1934; S. C. Wallace, *The New Deal in Action*, Chap. xi; H. A. Wallace, *New Frontiers*, Chaps. xiii-xvi; L. M. Hacker, "Ploughing the Farmer Under," *Harper's Mag.*, CLXIX, 60-74 (June, 1934).

declared to be not a violation of the anti-trust laws. Of even greater importance was the power conferred to issue, or to refuse, revocable licenses (and to fix their terms) permitting processors and others to handle, in the current of interstate or foreign commerce, *any* agricultural commodity or "any competing commodity." The object, of course, was to enable the secretary to prevent—or eliminate—unfair prices and practices.¹

Almost from the day of enactment, the constitutionality of the Agricultural Adjustment Act was questioned, attacks centering chiefly upon the processing taxes—"the heart of the law." Hundreds of cases appeared in the federal courts challenging the right of the government thus to employ the taxing power as a means of bringing about national regulation of agricultural production, and in a six-to-three decision rendered early in 1936,² the Supreme Court pronounced the taxes unconstitutional, asserting that they were not taxes in the true sense (that is, levies for the support of the government), but rather exactions from one group to provide benefits for another—a device, too, by which Congress had presumed to invade a field reserved to the states under the Tenth Amendment and therefore outside the sphere of the national government.³

The
A.A.A.
declared
uncon-
stitu-
tional
(1936)

A New Approach to "Parity"

Invalidation of the processing taxes was a severe blow both to government revenues and to farmers, who could no longer hope to receive the benefits, or bounties, which the processing taxes had provided.⁴ If such assistance and government control of production were to continue, obviously a new plan must be devised under constitutional authority other than the taxing power. A starting point was found in the long-assumed right of Congress to provide for conservation of the nation's natural resources; and in a Soil Erosion Act,⁵ passed in 1935, following widespread devastation and distress wrought by floods and sand-storms, Congress had unwittingly provided a foundation upon which a new farm-aid and crop-control program could be projected.

The Soil
Erosion
Act
(1935)

¹ By fixing prices, establishing quotas for producers, providing rules of fair competition, and setting up boards of control, marketing agreements under the act brought into existence a far greater amount of coöperative marketing than previously existed. Closely related to the Agricultural Adjustment Act were the Bankhead Cotton Control Act of 1934, the Kerr-Smith Tobacco Control Act of 1934, and the Warren Potato Act of 1935.

² *United States v. Butler*, 297 U. S. 1 (often referred to as the *Hoosac Mills* case).

³ The marketing provisions of the law were reenacted after the decision. 50 *U. S. Stat. at Large*, 246.

⁴ The cost of the A.A.A. to the national treasury, and ultimately to the public as consumers and taxpayers, was approximately \$1,700,000,000, of which about \$900,000,000 was recovered through the processing taxes. While the system was in operation, a heavy increase in farm income took place. In part, the A.A.A. was no doubt responsible; but there were other influences at work, and some students of the subject consider these the most important. For a good analysis, see Anon., "Farm Policies Under the New Deal," *Pub. Affairs Pamphlets*, No. 16 (New York, 1938).

⁵ 49 *U. S. Stat. at Large*, 163. The administration of this act falls to the Soil Conservation Service in the Department of Agriculture. See Anon., "Saving Our Soil," *Pub. Affairs Pamphlets*, No. 14 (New York, 1937).

The Soil
Conserva-
tion and
Domestic
Allotment
Act
(1936)

The measure had declared it to be "the policy of Congress to provide permanently for the control and prevention of soil erosion and thereby to preserve natural resources, control floods, prevent impairment of reservoirs, maintain the navigation of rivers and harbors, protect public health and public lands, and to relieve unemployment"; and, believing that an indirect production-control plan, if tied in with this soil conservation measure, would pass the test of constitutionality, Congress, in February, 1936, passed a Soil Conservation and Domestic Allotment Act¹ erecting a new edifice of farm relief and making production control *incidental* to soil conservation. As in the A.A.A., restoration of the pre-war purchasing power of the farmer by cutting down surpluses was the end sought; but the goal was now to be reached by a new route. Instead of paying bounties to farmers directly for curtailing production, benefit payments are made to them under the new statute if they voluntarily cooperate with the government in the work of soil conservation, especially in shifting land from soil-depleting crops to soil-conserving or soil-building crops or practices; and, whereas under the Agricultural Adjustment Act bounties were restricted to producers of one or more of some fifteen specified crops, under the 1936 measure every one became eligible to participate. It so happens that the very crops whose production the government had mainly sought to curtail under the A.A.A. as being responsible for the unmarketable surpluses of preceding years are also those principally responsible for soil depletion; and in providing for benefit payments to farmers diverting portions of their land from such crops as corn, cotton, tobacco, and wheat to others of a soil-building character, such as alfalfa and clover, the government was killing the proverbial two birds with one stone. Bounties go also to farmers turning land from cultivation to pasturage.² No special taxes, like the A.A.A. processing taxes, are levied to meet the payments entailed; instead, all are met out of general funds accruing to the government through the ordinary channels of taxation. Constitutionally, they are presumed to rest upon the power to levy taxes and appropriate money for the general welfare—procedures to which the Supreme Court takes no exception. For administering the system, the Agricultural Adjustment Agency in the Department of Agriculture is primarily responsible; and it operates through state, county, and community committees elected by participating farmers from their own number.

Inasmuch as the Soil Conservation and Domestic Allotment Act failed to provide any *direct* production control, it was soon found inadequate

¹ 49 U. S. Stat. at Large, 1148.

² Shortly after the adoption of the Soil Conservation and Domestic Allotment Act, Congress, in April, 1936, gave advance and blanket approval to interstate compacts having as their chief purpose the regulation of the production and marketing of tobacco. The act (49 U. S. Stat. at Large, 1939) envisaged the cooperation of the principal tobacco-producing states; and such compacts as are made must be along the lines of a tobacco-control act passed by the Virginia legislature in March, 1936. No interstate compacts on the subject have as yet been adopted.

to prevent the accumulation of price-depressing surpluses. In 1938, therefore—a year in which surpluses, already staggering, promised to be further swollen by bumper crops—Congress passed a new Agricultural Adjustment Act,¹ making provision, like its ill-fated predecessor, for an extensive system of crop control, but scrupulously avoiding processing taxes and any other devices likely to meet with judicial disapproval. Continuing the soil conservation program of 1936, the measure sought to insure direct production control by authorizing acreage allotments or quotas for states, counties, and individual farms, covering five commodities (wheat, corn, cotton, rice, and tobacco) and, in addition, authorized the secretary of agriculture to set up marketing quotas for these crops when in any given year the total supply of a commodity promised to exceed the normal supply by a stipulated percentage, and with penalties for sales in excess of such quotas.² Farmers adhering to the quotas assigned them were to receive parity payments in addition to the bounties received for conservation practices. The most distinctive features of the new A.A.A. appeared, however, (1) in provisions encouraging the systematic storage of surpluses of big-crop years for use in years of shortage, thus removing them from the market when prices were too low, and (2) in a provision for wheat-crop insurance, undertaking to protect producers against loss in yields due to such unavoidable causes as drought, flood, insect infestation, and plant disease. Insurance costs (*i.e.*, premiums) were made payable by the insured to the government either in cash or in surplus wheat, the latter being utilized to form the major part of a government-held “ever normal granary” in that commodity, ready to be sold for the benefit of the farmer if and when his crop in succeeding years should fall below the average yield per acre; and in 1941, the same insurance plan was extended to cotton.³

Independent of the new A.A.A., but designed to reinforce its provisions for reducing surpluses, were three other expedients: (1) export subsidies for wheat, cotton, and cotton goods; (2) provision of free lunches for several million under-nourished school children; and (3) the distribu-

¹ 52 U. S. Stat. at Large, 31.

² In form at least, the voluntary character of the system was maintained by a provision that no quota might become effective unless, on a referendum being taken, as many as two-thirds of the producers favored it. See L. V. Howard, “The Agricultural Referendum,” *Pub. Admin. Rev.*, II, 9-26 (Winter, 1942).

³ A Federal Crop Insurance Corporation was set up in the Department of Agriculture to administer this insurance system. See J. C. Clendinin, *Federal Crop Insurance in Operation* (Palo Alto, Calif., 1942).

Confidence that the new Agricultural Adjustment Act would be sustained by a Supreme Court which, in any event, was by 1938 giving strong evidence of liberalization, was vindicated by a decision in 1939 (*Mulford v. Smith*, 307 U. S. 38) upholding the marketing provisions as applied to tobacco, and by another in 1942 (*Wickard v. Filburn*, 317 U. S. 111) approving the imposition of a penalty for wheat produced in excess of a prescribed quota, even when the excess was consumed on the farm where it was raised. In the latter case, the Court held that the excess wheat, even though grown for home consumption, “exerts a substantial economic effect in interstate commerce,” because “it supplies the need of the man who grew it, which would otherwise be reflected by purchases in the open market.” In this sense, the Court held, home-grown wheat, “competes with wheat in commerce.”

tion of food stamps among eligible low-income families, to be used in exchange for specified surplus commodities (including cotton) at local stores—a device, however, terminated, under wartime conditions, in 1943.¹

Some Wartime Developments

New emphasis on production

Little did the authors of these various crop-restriction and surplus-reduction programs dream that the day was coming when the country's top problems in agriculture would be those of increasing production and building up surpluses.² But so it turned out—and before the new A.A.A. had been in operation long enough to enable any full estimate of its effectiveness to be framed. Even before the United States entered the war, the expanding need for American foodstuffs in the war-torn democracies, the augmented assistance to them authorized by the "lend-lease" legislation, and the growth of consumer demand in our own country arising from our defense effort, impelled the Department of Agriculture to announce a farm program for 1942 calling for "the largest production in the history of American agriculture." The increases mainly contemplated were in what had previously been considered non-basic commodities—chiefly such foodstuffs as poultry, eggs, milk and other dairy products, meat, vegetables, and sugar. Basic crops with a long record of surpluses—wheat, cotton, tobacco, and rice—continued under somewhat restricted production and marketing until 1943; although corn acreage (corn being a feed grain) was allowed to be considerably increased, and the 1943 crop proved the largest in a decade. As a result of heavy feeding of wheat also to livestock, and of its use in the production of alcohol, that grain was, by 1943, fast moving from a surplus to a deficit situation; and early in the year the War Food Production Administration removed all wheat-acreage and marketing restrictions, with the result that the 1943 crop became the second largest on record. Not only so, but in midsummer the same authority asked wheat-growers to step up their 1944 acreage to sixty-eight million, as compared with somewhat over fifty-four million seeded the previous year. Finally, in 1944, all effort to control food production, save by voluntary means, was abandoned, although restrictions were retained upon the production and marketing of tobacco.³

¹ S. Herman, "The Food Stamp Plan; A Study in Law and Economics," *Jour. of Business*, XIII, 351-359 (Oct., 1940), and XIV, 11-35 (Jan., 1941); "The Food Stamp Plan Terminates," *ibid.*, XVI, 173-194 (July, 1943).

² Without Congress or the country knowing much about it, experts in the Department of Agriculture had, however, been alive to the possibility of a world upheaval; and the relative ease with which the Department adapted itself to the new situation after 1939 is explained largely by these experts' foresight and preparation.

³ In line with this radically changed situation, the Agricultural Appropriation Act for 1944 withdrew all financial support from the wheat and cotton insurance programs, providing only sufficient funds to carry out insurance contracts applying to 1943 crops.

Crop insurance, however, was endorsed by both major parties in their 1944 platforms; and by the end of the year, Congress had set up a permanent insurance system for wheat, cotton, and flax, and provided experimental projects or trial

Within a year after Pearl Harbor, the well-being of the people and the prosecution of the war itself were menaced by rising prices and by a growing danger of run-away inflation; and agriculture was deeply involved. Early in 1942, a powerful farm bloc in Congress contrived to write into a basic Emergency Price Control Act a provision prohibiting ceilings on food products until farm prices had gone, on the average, sixteen per cent beyond "parity prices"—parity, it will be recalled, being a level of prices at which farm products would have the same purchasing power as during the five-year period preceding the first World War. Thus shielded, farm prices mounted steadily; and in September President Roosevelt informed Congress that with a view to keeping the cost of living within bounds, the recent prohibiting clause would have to be repealed, and, further, that if it were not repealed by October 1, he, acting under his authority as commander-in-chief, would disregard its restrictions and proceed independently to carry out an anti-inflationary program entailing both wage stabilization and fixing of farm prices considerably below "parity." Amid loudly voiced protests against this threatened suspension of national law by independent executive action (in a situation in which no charge was made, or could be made, that presidential prerogatives had been encroached upon), Congress went to work on bills ostensibly aimed at accomplishing the desired purpose; and shortly after the presidential dead-line was reached an act was passed authorizing the chief executive to stabilize not only farm prices, but wages and salaries. In the case of farm prices, however, the measure went only half-way; because ceilings might not be fixed below either parity or the highest market levels between January 1 and September 15, 1942, whichever was higher. Thenceforth, the consumer had better protection against sky-rocketing food costs, yet with the farmer enjoying a prosperity limited only by an inadequate labor supply.¹

Controlling
farm
prices

To meet problems of the war, the Department of Agriculture has been obliged to alter its organization in many respects, to set up new service units, to broaden and reorient its scientific work, and to establish new relations with other public agencies. From 1942, the Department has functioned as a food administration; and to promote its efficiency as such, a reorganization was brought about by executive order in Decem-

Adminis-
trative
read-
justments

insurance of other crops "on which actuarial data is available," such as corn, tobacco, rice, peanuts, soy-beans, sugar beets, and citrus fruits. Public Law No. 551, 78th Cong., 2nd Sess. See "How Farmers Can Get Crop Insurance," *U. S. News*, Feb. 2, 1945, p. 30.

¹ N. A. Bailey, "Are the Farmers Playing Fair?," *Curr. Hist.*, II, 109-112 (Apr., 1942). On the control of inflation by agricultural price stabilization and subsidies, see *Report of the Department of Agriculture* (1942), 27-38; *ibid.* (1943), 31-44. Meanwhile, Congress has given pledges that farm prices will be held relatively high for a period after the war, regardless of general economic conditions; and out of this may arise some perplexing problems.

Before the close of 1942, a towering difficulty had come to be that of maintaining and recruiting a supply of farm labor, in the face of calls to military service and of demands of urban industry, adequate to keep production at the peak levels urgently needed.

ber of that year. All agencies concerned with the production of food and fibers were united in a Food Production Administration; all having to do with the processing, storage, allocation, and distribution of food were consolidated in a Food Distribution Administration; and the Commodity Credit Corporation—an establishment existing since 1933, placed in the Department of Agriculture in 1939, and empowered under its Delaware charter to buy and sell, lend upon, or otherwise deal in agricultural and other commodities—was directed to operate at the behest of, and in close coöperation with, the new Administrations. Finally, in March, 1943, the two Administrations, together with the Commodity Credit Corporation and the Extension Service, were consolidated into an Administration of Food Production and Distribution; and with name changed to War Food Administration, this agency is now functioning under the direction and supervision of a War Food Administrator, responsible directly to the president.¹ To the War Food Administrator it falls to determine military, civilian, and foreign food requirements, to formulate and carry out programs for producing the supplies necessary to meet these requirements, to assign priorities and make allocations of food for all purposes, to fix the quantities available for civilian rationing, and to handle matters of policy relating to agricultural labor.²

Credit Facilities

In concentrating to this point upon the basic matters of production and marketing, we have by-passed another very important activity of the prewar period, and one to which we now must turn briefly, *i.e.*, assistance to the farmer in the form of credit facilities.

Prior to
1933

Farmers desiring to acquire land, make improvements, or carry over crops in the hope of a better market frequently have to borrow money. Long ago it became apparent that they had less easy access to funds than did industrial interests, and were required to pay higher interest rates; and after a commission appointed by President Wilson looked into the matter, Congress, in 1916, passed an act creating a nation-wide farm loan system, operating under a Federal Farm Loan Board. In a leading city of each of twelve districts into which the country was divided for the purpose was established a federal land bank, with capital subscribed mainly by the United States, and endowed with power to issue tax-exempt bonds to raise money with which to make loans secured by mortgages on landed property. The banks lent money, however, not directly to individual farmers, but to groups of ten or more organized voluntarily in what were known as national farm loan associations. An association re-

¹ The Administrator's functions in connection with priorities and rationing are exercised through the Office of Price Administration and Civilian Supply. See pp. 689-690 below.

² Concerning the government's wartime activities in the field of agriculture, much may be learned from the annual reports of the Department of Agriculture for 1942-44. Cf. J. L. McCamy, "Agriculture Goes to War," *Pub. Admin. Rev.*, II, 1-8 (Winter, 1942).

ceived applications from its members, approved or rejected them, took and endorsed mortgages on the applicants' property, and, on the basis of these, secured from the banks the funds which it passed out in the form of loans to its members. The same act of 1916 also authorized the formation of joint-stock land banks, with capital stock subscribed wholly by private individuals, and enjoying about the same privileges and performing the same functions as the federal land banks. And to complete the structure, an act of 1923 instituted a series of twelve intermediate credit banks designed especially to serve the farmer who wanted, not long-term credit, but loans for a few months or a year, and loans secured, not on land, but on livestock, corn, wheat, or other commodities.

By 1933, it was plain that larger facilities for agricultural credit would have to be provided; in the preceding five years, a tenth of the country's farms had been sold at public auction to satisfy creditors, and the number of such sales was steadily increasing. Already, the act which created the Reconstruction Finance Corporation in 1932 had empowered that agency to organize regional agricultural credit corporations in the twelve federal land-bank districts, with a capital in each case of not less than two million dollars subscribed by the Corporation. Loans made by these institutions to farmers and stock-men had helped, but not enough; and a Farm Relief Act of 1933 authorized the Corporation to allocate to the farm loan commissioner (later known as the land-bank commissioner) the sum of two hundred millions, to be used in making loans to farmers, secured by first and second mortgages. The act likewise provided working capital for farm operations and made possible the redemption or repurchase of farm property lost under foreclosure proceedings between July 1, 1931, and May 12, 1933. In time, other steps were taken. A central bank for coöperatives, with a regional bank in each of the twelve federal land-bank districts, was established to serve twelve thousand or more coöperative buying and selling associations among farmers of the country; twelve production credit corporations were set up, one in each city having a federal land bank, to provide short-term credit for all types of farm and ranch operations; as mentioned above, a Commodity Credit Corporation was brought into existence by executive order of October, 1933, with power to buy, hold, sell, lend upon, or otherwise deal in such agricultural commodities as might be designated from time to time by the president; and a Federal Farm Mortgage Corporation, created by Congress in June, 1934, was empowered to issue tax-exempt bonds (guaranteed by the government) to the extent of two billions—bonds which might be exchanged for others held or issued by federal land banks, thereby increasing the resources of the land banks available for the refinancing of farm mortgages.¹

¹ After one act of Congress providing for moratoria on the foreclosure of farm mortgages was pronounced unconstitutional by the Supreme Court in 1935 (*Louisville Joint-Stock Land Bank v. Radford* 295 U. S. 555) another on somewhat different

The
credit
set-up
sum-
marized

The upshot of these and other measures is that in each of the twelve federal land-bank districts there is now a federal land bank, a federal intermediate credit bank, a bank for coöperatives, and a production credit corporation—the four forming a single administrative unit, and the whole comprising a truly gigantic framework of agricultural credit institutions. The management of the entire system, including the Commodity Credit Corporation, furthermore, has been gathered into the hands of a single coördinating authority, the Farm Credit Administration, originally created by executive order in 1933, incorporated into the Department of Agriculture in 1939, and permanently superseding the Federal Farm Board and a long list of cognate agencies.

Some
results

How serviceable the system will prove in the long run remains to be disclosed; the problems of the farmer, under modern national and international conditions, are too complicated to be solved by mere access to loan funds. If, however, it be agreed that a prime essential is to enable the farmer to retain possession of his land, and to continue supporting his family from it notwithstanding ups and downs in general agricultural conditions, it would seem that facilities to that end could hardly have been provided more generously by an anxious government, constantly prodded, as of course it has been, by a powerful farm lobby. Even by 1936, a total of over three billion dollars had been placed at the disposal of farmers by the agencies mentioned; an epidemic of foreclosures which at one stage had prompted farmers in some sections of the West to band together to intimidate purchasers, close courts, and terrorize judges had been stayed; and hundreds of thousands of farmers had been enabled to liquidate their debts. During the present war, the various services have been expanded to meet new needs, with farmers urged to use their surplus funds in a period of high income to pay their debts and purchase war bonds.

Rural Betterment

From activities directed to the scientific and economic aspects of farming, the Department of Agriculture has moved on in later years, especially since 1933, to what may be termed broadly the human, or social, aspects of the occupation. Impelled to do this by rural backwardness and distress brought sharply to view by the economic depression of the thirties, it now regards as part of its regular job the systematic promotion of better living conditions in rural communities.¹ Only a few outstanding services of this nature can, however, be mentioned here.

lines was upheld (*Wright v. Vinton Branch Mountain Trust Bank*, 300 U. S. 440) in 1937. As a result, large numbers of farmers have been able to procure adjustments with their creditors and retain their land.

¹ This function it shares, of course, with establishments such as the Department of Labor, the Public Health Service, and the Office of Education; and all have drawn inspiration and guidance from private agencies such as the Country Life Commission appointed by President Theodore Roosevelt nearly forty years ago. For a broad treatment of the subject, see J. M. Gaus and L. Wolcott, *op. cit.*, Chap. xi.

The agricultural credit institutions described above are designed primarily to benefit farmers who own, or have an ownership interest in, the land they cultivate. There is another great agricultural class that cannot avail itself of these credit agencies, for the reason that those who belong to it own no land and little, if any, other property that might serve as a credit basis for loans. These less fortunate people are the tenant farmers, share-croppers, and farm laborers, who since 1880 have been steadily, if not alarmingly, increasing in proportion to the number of farm-owners. They are the people who give rise to what is called the farm tenancy problem; and the areas where most of them live, in Southern and Southwestern states, form our "rural slums." Following a penetrating, and fairly startling, report in 1937 on the conditions and outlook of these submerged elements, submitted by a committee on farm tenancy appointed by President Franklin D. Roosevelt, Congress in the same year passed the Bankhead-Jones Farm Tenant Act,¹ under which the government, operating through state and local machinery terminating in county committees of farmers, not only makes outright grants to meet emerging situations, but makes forty-year loans on easy terms to farm tenants, farm laborers, and share-croppers to enable them to acquire homes and lands of their own, and likewise "rehabilitation loans" for the purchase of livestock and farm equipment, for refinancing indebtedness, and for family subsistence. The administration of the act falls to one of the newer agencies in the Department of Agriculture, the Farm Security Administration.²

1. Relief
for farm
tenants

The depression of the thirties focused attention upon between three and four million "economic refugees," many of whom dwelt in the depressed mining and manufacturing regions of the East and Middle West, although the majority were extracting a meager living from dying cotton lands in the South, from the dry and exhausted arable and grazing lands of the West and Southwest, and from the cut-over timber areas of the North and Northwest. To remove these millions from public relief rolls, and keep them off, the national government launched, in 1935 and succeeding years: (1) a "land-use program," directed toward taking some ten million acres of substandard or submarginal land out of crop production and turning it to proper uses;³ (2) a "resettlement program," designed to provide adequate homes and good farm lands for people toiling on substandard land; (3) a "rehabilitation program," having for its primary purpose reestablishment of the credit of indigent farmers living on reasonably satisfactory land; and (4) a "suburban program," looking to the development of "model" communities on the outskirts

2. Im-
proved
land use

¹ 50 U. S. Stat. at Large, 522.

² R. B. Vance, "Farmers Without Land," *Pub. Affairs Pamphlets*, No. 12 (New York, 1937); *Law and Contemporary Problems*, IV, 423-575 (Oct., 1937), series of articles on farm tenancy. In the first two years, loans totalling \$232,410,000 were made to 650,000 farm families.

³ *E.g.*, by turning the farms back to forest or pasture, or by converting them into wild-life refuges or parks.

of urban areas, for the benefit of low-income city workers and suburban farmers.¹ Management of these various enterprises, stemming from different roots, was at first (1935) intrusted to an independent establishment known as the Resettlement Administration, but in 1937 was transferred to the newly created Farm Security Administration in the Department of Agriculture, to which, as indicated above, was assigned also the administration of the Farm Tenant Act.

3. Rural electrification

In providing electrical energy for the rural sections of the nation, the United States has lagged far behind other important countries; and it was to change this situation that Congress, in May, 1936, passed a Rural Electrification Act launching a long-time program aimed at bringing cheap light and power to American farms so as to lessen the drudgery of the farmer and his wife and supplement the farm's income-producing equipment. An appropriation of \$410,000,000 was made for a ten-year period beginning July 1, 1936, and a Rural Electrification Administration was set up to manage the fund and carry out the project.² Half of the fund is being used for self-liquidating loans to individuals, associations, or corporations, and to states or local-government bodies, to enable them to build transmission lines and buy generators for furnishing electrical energy to people living in rural areas who are not receiving central station services, the other half being lent to individuals to finance the wiring of farm buildings and to install electrical and plumbing appliances and equipment. No direct grants of funds are made, assistance being confined to management guidance and to interest-bearing loans made only after investigation has shown that a project will be self-liquidating.³ R.E.A.-financed lines are today (1945) serving Army camps, Navy and Coast Guard stations, cinnabar and manganese mines, oil fields, vocational training centers, and a variety of rural centers, and have been of incalculable aid to wartime agriculture.⁴

On the theory that a family in good health is a better credit risk than

¹ Greenbelt, Maryland, seven miles from Washington, became, in October, 1937, the first of these communities to be opened for occupation. See C. Larson, "Greenbelt, Maryland; A Federally Planned Community," *Nat. Mun. Rev.*, XXVII, 413-420 (Aug., 1938).

² First established by executive order in 1935 as an independent agency, the Administration was transferred in 1939 to the Department of Agriculture.

³ The law is presumed to be so drawn as to avoid competition with existing utility systems. Private companies have, however, been extending their lines in many places to forestall government-financed coöperatives from being formed.

⁴ By July 1, 1943, the R.E.A. had advanced some \$466,000,000 to 868 borrowers, including 795 locally owned coöperatives organized for the specific purpose of extending rural electrification, with the result that electric service had been brought for the first time to a million farms. The percentage of electrified farms had increased from about ten in 1935 to forty, although, of course, partly as a result of extension of private utility lines. On the importance of farm electrification to wartime agriculture, see *Report of the Department of Agriculture* (1942), 210-212; *ibid.*, (1943), 236-238; *Report of the Administrator of the Rural Electrification Administration* (1943), 1-6. Cf., *U. S. Government Manual* (Summer, 1944), 555-559; J. King, "The R.E.A.—A New Deal Venture in Human Welfare," *Public Utilities Fort.*, XXI, 398-407 (Mar. 31, 1938); R. Stewart, "Bringing Power to the Farm," *ibid.*, XXVII, 579-587, 651, 663 (May 8, 22, 1941).

a family in poor health, the Farm Security Administration has developed, since 1938, a medical-care program for its clients; and thus while Congress and the general public have been debating the prickly issue of "state medicine," one federal agency "has jumped the legislative gun and instituted its own program of socialized medicine."¹ The Security Administration is now fostering group-health plans, worked out in co-operation with physicians, in more than a third of the three thousand counties in the United States, and under them in 1943 more than 110,000 farm families, or about 572,000 persons, were obtaining medical care by payment of annual fees within their means. Besides general physicians' care, services often cover emergency surgery, limited hospitalization and prescribed drugs, and, in many cases, dental care.²

4. Medical care

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- ¹ S. Lubell and W. Everett, "Rehearsal for State Medicine," *Sat. Eve. Post*, CCXI, 22 ff. (Dec. 11, 1938); H. Hellman, "The Farmers Try Group Medicine," *Harper's Mag.*, CLXXXII, 72-80 (Dec., 1940); *Report of the Administrator of the Farm Security Administration* (1940), 21-24.
- ² Proposals are now (1945) pending in Congress to amend the Social Security Act of 1935 (see pp. 625-626 below) so as to provide medical and hospital care, on the one hand, for persons of average income and, on the other, for the indigent.

CHAPTER XXX

THE CONSERVATION OF NATURAL RESOURCES

Slow
awaken-
ing of
the peo-
ple on
the sub-
ject

Perhaps it is inevitable that an energetic and expanding people eagerly possessing itself of a virgin country richly endowed by nature should be guilty of spoliation and waste. So, at all events, it has been in the United States, where for a hundred years good land was so abundant, and forest, mineral, and other resources so apparently inexhaustible, that no generation troubled itself greatly about economical use in its own day or possible shortage later on.¹ Toward the close of the nineteenth century, warnings began to be sounded, not only that the supply of available public land was fast diminishing, but that continued heedless exploitation of forests, minerals, and other natural wealth would some day leave the country impoverished. Theodore Roosevelt, when president, made the conservation of natural resources one of his major concerns, along with the curbing of trusts and monopolies; and it was in his time that the country may perhaps be said first to have become in some degree "conservation conscious." Even at that period, most people could only with difficulty divest themselves of the notion that there was plenty of everything, and therefore no cause for anxiety. Only as—in the next quarter-century—the fact was gradually brought home that we already had used up more than half of our known petroleum supply, the larger part of our natural gas, more than a third of our high-grade coal, and an amazingly large proportion of our forest reserves—to say nothing of having exhausted millions of acres of our soil—did the nation really awaken to the urgent importance of conserving resources and, where possible (as in the case of forests and perhaps soil) restoring some part of what had disappeared. The strain put upon the nation by the demands of the present war further dramatized the situation; and today we realize more adequately than ever before, not only that "our national wealth forms the sinews and muscles of our defense machinery,"² but that squandering and dissipating the natural resources constituting so large a part of that national wealth is the surest way of inviting national impoverishment and decline.

Like so many others of our problems, that of protecting natural resources—of adjusting the natural environment to human requirements

¹ "It was once said by Mr. Henry A. Wallace . . . that 'no civilization has ever builded in so short a time what our forefathers builded in America'; but it may equally well be suggested that no civilization has in so short a time consumed and destroyed so much of the resources of the earth." H. Finer, *The T. V. A.; Lessons for International Application* (Montreal, 1944), 3.

² *Annual Report of the Secretary of the Interior* (1940), p. xxxi.

and maintaining a suitable balance between the present and future needs of our people—is greatly complicated by our federal system of government. Up to a point, to be sure, the national government has free scope. There are still large areas which belong to the nation as distinguished from states, cities, and private individuals or corporations; and on this federally owned public domain, the government at Washington has full power to restrict the exploitation of minerals, to control the use of water-power, to preserve forests and plant new ones, to protect wild life, and what not. And, naturally, here is where the work of conservation has been pursued most vigorously and effectively. The greater part of the country's resources, however, are in areas over which the national government has no control as owner. Here the problem is primarily one for the states and their subdivisions; and, in varying degrees, it is receiving attention from them, particularly in the matter of forestry. But many states are lax; nearly half have not even a conservation department; no single, nation-wide program of state action can be expected; and if satisfactory results are to be attained, federal encouragement, guidance, and assistance are almost as essential as on the national public domain itself. Nor are means wholly lacking by which the national government can exert itself in this direction. Through discussion and published information, it can educate the people on the subject; through grants-in-aid, it can join with the states in financing and controlling conservation activities; its commerce power can be invoked in regulating the development and use of navigable streams and the sale of commodities and services, *e.g.*, hydroelectric energy, and its treaty-making power in protecting migratory wild-life. All of these things not only can be, but are being, done; and it is reasonable to expect that as time goes on conservation will be nationalized increasingly. So numerous and varied have federal conservation activities already become that half of the major bureaus and services in the Department of the Interior have to do with one or another of them. So extensive are such activities, indeed, that it often has been proposed that the name of the Department itself be changed to that of Department of Conservation.¹

Bases of
federal
action

Federal conservation activities have to do, first of all, with the most basic of natural resources, *i.e.*, land. At one time or another, most of the

Public
lands

¹ The main branches of the Interior Department are: (1) the General Land Office, (2) the Bureau of Reclamation, (3) the Geological Survey, (4) the Grazing Service, (5) the Bureau of Mines, (6) the Office of Indian Affairs, (7) the National Parks Service, (8) the Fish and Wild-Life Service, (9) the Petroleum Conservation Division, (10) the Solid Fuels Administration for War, (11) the Division of Power, (12) the Division of Territories and Island Possessions, (13) the Puerto Rico Reconstruction Administration, (14) the Office of Land Utilization, (15) the Bonneville Power Administration, and (16) the Southwestern Power Administration. *U. S. Government Manual* (Summer, 1944), 316-341.

On the origins and earlier history of the Department, see H. B. Learned, *The President's Cabinet*, Chap. x, and L. M. Short, *Development of National Administrative Organization in the United States*, Chap. ix. Later developments and present functions are portrayed currently in the annual reports of the secretary of the interior.

continental United States, outside of the thirteen original states, has been "public land," that is, land nationally owned. And throughout most of our history, the policy has been to open such land generously to private ownership and use. Vast quantities were in earlier days granted to the states for sale in aid of education and internal improvements; later on, much was bestowed upon transcontinental railroads; a great deal was allotted to soldiers and sailors; large tracts were sold to speculating land companies; and under terms of a Homestead Act of 1862—offering one hundred sixty acres to any person who would pay a registration fee of ten dollars and perform a limited amount of work on his holding during a period of five years—millions upon millions of acres were parcelled out among pioneering home-seekers. Prodigality and fraud often went hand in hand; yet vast areas were occupied by thrifty populations which helped greatly to make the country what it is today. More recently, however, the government's policy has been sharply reversed. Realizing that the public domain was in danger of utter depletion, and desiring to retain control for the sake of protecting forest, mineral, and other resources, it, in 1935, completely stopped making grants to individuals and corporations and decreed (by executive order) that such of the domain as survived should thenceforth constitute a permanent national reserve.¹

Not only, however, has the nation stopped divesting itself of public land, but it has stepped up various procedures by which for a good while it has been acquiring land by purchase, condemnation, cession, and gift from private (or sometimes even public) holders—such procedures including programs of public power development, park development, submarginal land rehabilitation, soil conservation, fertilizer experimentation, slum clearance, low-cost housing, and, in more recent days, defense and war activity. Not infrequently, settlers have been removed from the very land which they or their forefathers acquired from the government. The upshot is that today twenty-one per cent (more than one-fifth) of the entire continental area of the United States is federally owned—an aggregate equal to all that part of the country east of the Mississippi River less only Mississippi, Alabama, Georgia, and Florida. More than half of Arizona, Nevada, Idaho, and Utah are so owned. For many of the states, a serious problem has been raised; because, once the title to land is vested in the federal government, such land becomes immune from state and local taxation. And in response to demands for

¹ At that time, the amount remaining was approximately 440,000,000 acres (besides 240,000,000 acres in Alaska). Of the holding in the United States proper, about thirty-five per cent is now included in national forests and twelve per cent in Indian reservations.

On public land history and policy, see B. H. Hibbard, *A History of Public Land Policies* (New York, 1924); R. S. Yard, *Our Federal Lands; A Romance of National Development* (New York, 1928); R. M. Robbins, *Our Landed Heritage; The Public Domain, 1776-1936* (Princeton, 1941); Committee on the Conservation and Administration of the Public Domain, *Report to the President of the United States* (Washington, 1931).

recompense, Congress has enacted legislation requiring some of the federal undertakings to make contributions to units of government most affected in lieu of taxes.¹

Large stretches of the earlier public domain, located chiefly in the Western states, were arid or semi-arid—much of the land fertile enough, but unproductive unless supplied with water; and since 1902 a Reclamation Bureau in the Interior Department has been charged with conservation of the limited water resources of seventeen Western states for irrigation, power development, and domestic and industrial uses. In 1943, fifty-two reclamation projects were in operation, supplying water for the production of essential foods on nearly 90,000 farms, and generating hydroelectric power necessary to numerous army and navy posts, air bases, training centers, and war-production plants. Many such projects, notably Boulder Dam and the recently completed Grand Coulee, not only supply water for extensive irrigation projects and power for both peacetime and wartime industries, but afford sorely needed flood protection as well.²

Until late years, the policy of conservation, in the stricter sense of the term, has been applied mainly to three major resources—forests, minerals, and petroleum.³ Although of inestimable value not merely for timber, but for their effects upon the distribution of moisture, and in other obvious ways, the wooded areas of the country (today about 630,000,000 acres) have long stood in danger of utter denudation at the hands of private owners; and it has fallen not only to the states, but to the national government as well, both to stay the process by exhortation and education and to establish and maintain extensive forest preserves on publicly owned land. At the present time, there are 160 national forests, located in thirty-three different states and territories, and with an aggregate area only slightly smaller than that of the state of Texas. To be sure, these forest areas are not simply walled off as reserves for the future. Timber is cut and marketed in them by private companies, under federal supervision; some tracts are leased for grazing purposes; all are open to campers and other recreation-seekers, under conditions involving no damage to the wooded growth. But the first consideration is the preservation of them as *forests*. Administration is in the hands of a Forest Service in the Department, not of the Interior, but of Agriculture; and on the ground that the Service is more immune from political manipu-

¹ On such contributions by the Tennessee Valley Authority, see p. 595, note 2, below.

² *Annual Report of the Secretary of the Interior* (1943), 61-70.

³ Among lesser, although not unimportant, resources covered has been wild life—fish, wild animals, and birds; and the national government first actively entered this field with an act of Congress in 1900 forbidding the shipment in interstate commerce of wild animals and birds taken in violation of state laws. Later, land was purchased for wild-life refuges; in 1929, a Migratory Bird Conservation Commission was created; in 1937, the Pittman-Robertson Act earmarked excise taxes on fire-arms, shells, and cartridges for apportionment among the states in aid of wild-life conservation projects.

lation in the present department than it could hope to be in the Interior, those who have its interests at heart have consistently opposed reorganization schemes that might eventuate in transferring it from its present location. Since Pearl Harbor, the Forest Service has devoted its major efforts to war activities, collaborating with the War Production Board and other agencies in facilitating the output of timber, in stimulating more diverse and efficient use of wood, in increasing the yield of naval stores, in promoting more efficient use of the Western cattle-range for food production, and in assuming responsibility for growing guayule rubber to offset in part the cutting off of imports from abroad.¹

Mineral resources on the public domain are conserved, too, by a policy developed since 1910 under which the government expressly reserves for itself any mineral wealth that may be found to exist, and merely leases mineral lands for exploitation by private interests operating under government supervision and paying royalties into the national treasury, a portion being turned over to the states concerned. Mineral resources are studied and reported upon by the Geological Survey in the Department of the Interior; and mining methods, prevention of mine accidents, and treatment and utilization of ores, the country over, are dealt with similarly by a Bureau of Mines in the same department. So far as mineral resources are in private hands (and most of them are so), the main problem presenting itself to governments, both state and national, is that of relieving the long-depressed bituminous coal industry. Except temporarily during the war emergency, too much soft coal is mined; the high-grade deposits are showing signs of depletion; the business was operated at a huge loss for many years, and the condition of the workers has often been deplorable. The states, however, cannot—in any event, do not—act sufficiently in concert to make any headway with the problem. And when the national government sought in some degree to solve it, first through an N.R.A. coal code in 1933, and later through a “little N.R.A.” set up by the Bituminous Coal Conservation [Guffey] Act of 1935, the effort was frustrated by Supreme Court decisions.² However, a new Bituminous Coal [Guffey] Act,³ omitting all features of the earlier measure to which the Court had objected, was passed in 1937 and later upheld.⁴ Expiring in 1943, however, the legislation was not renewed. In point of fact, both the act of 1935 and the one which succeeded it were dictated by John L. Lewis, by threat of miners’ strikes, and both proved cumbersome to administer and otherwise objectionable in that they sanctioned monopolistic conditions in the industry. The coal problem—still unsolved—has many aspects besides that of conservation; but pro-

¹ *Report of the Chief of the Forest Service* (1943), p. xx; *ibid.* (1944), 10-27.

² The 1935 act was declared unconstitutional (*Carter v. Carter Coal Co.*, 298 U. S. 238, 1936) by a Supreme Court that had not yet recognized manufacturing and mining as partaking of the character of interstate commerce.

³ 50 U. S. Stat. at Large, 72.

⁴ *Sunshine Anthracite Coal Co. v. Adkins*, 310 U. S. 381 (1940).

tection of diminishing high-grade deposits is definitely involved in it.¹

Geologists tell us that the petroleum resources of the country, although among the richest in the world, will run low in another half-century unless the present rate of exploitation, greatly stimulated by the war, is curtailed; and oil, like metals, once taken from the earth, cannot be renewed. There are oil deposits on the public domain, and notwithstanding occasional scandals (like the Teapot Dome affair in the Harding administration) involving raids by greedy producers, protection of them by the federal government can reasonably be counted upon. Far the larger part of our reserves are, however, not on the public domain, but on lands owned privately; and this makes the problem primarily one for the states. The warmly contested right of the states to employ their police power to restrict operations and output has been resolved by the courts in favor of the disputed power.² Nevertheless, so intense is competition in the industry, and so tempting the profits, that state regulation has proved only intermittently effective—with the result that here again it has been necessary to fall back upon the superior vigor and force of the national government. Although going no farther than, in effect, to provide a federal guarantee of the enforcement of state regulations, the earliest federal effort proved a failure; for when the National Recovery Act of 1933 authorized the president to prohibit the transportation in interstate and foreign commerce of petroleum or its products produced or withdrawn from storage in excess of the amount permitted to be produced or withdrawn by any state law or regulation, the Supreme Court, in the "Hot Oil" cases of 1935, held that Congress had exceeded its constitutional authority by delegating to the chief executive power which by its nature was tantamount to making law.³ Unwilling to abandon the effort, Congress thereupon enacted legislation *directly* forbidding the shipment in interstate commerce of oil produced in excess of quotas fixed by state laws, with no authority in the president except to suspend the restriction if he found a disparity between supply and demand;⁴ and, supplemented by a conservation compact among oil-producing states, authorized in advance (in 1935) by Congress, this is the chief peacetime guarantee of oil conservation that the country now has.⁵

¹ G. L. Parker, *The Coal Industry* (Washington, 1940); E. V. Rostov, "Bituminous Coal and the Public Interest," *Yale Law Jour.*, L, 543-594 (Feb., 1941); W. H. Hamilton, "Coal and the Economy—A Demurver," *ibid.*, 595-620 (Feb., 1941). On April 19, 1943, the President appointed Secretary of the Interior Ickes solid fuels administrator for war, and charged him with assuring an adequate supply of coal and coke for armament production as well as for general industrial and civilian purposes. In a fashion, the coal situation has been carried along on this basis since the Guffey legislation expired, but not without much difficulty from strikes. It may be added that in 1941 an Anthracite Coal Commission was created by Congress to investigate and report on conditions in the anthracite industry. 55 *U. S. Stat. at Large*, 841.

² *Champlin Refining Co. v. Corporation Commission of Oklahoma*, 283 U. S. 210 (1932).

³ *Panama Refining Co. v. Ryan*, 293 U. S. 388 (1935).

⁴ 49 *U. S. Stat. at Large*, 30.

⁵ Drawn up at a governor's conference at Dallas, Texas, in February, 1935, this compact (for conserving gas as well as oil) has been ratified, at varying dates, by

The
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Government functions relating to petroleum problems have been dispersed widely among officers and agencies of the federal government and of the principal oil-producing states, and inevitably the national defense program instituted in 1940 led to steps not only for further conservation of oil resources, but also for coördination of the activities of all of these officials and of leaders of the industry itself. Shortly after proclaiming an unlimited national emergency on May 27, 1941, the President made the secretary of the interior "petroleum coördinator for national defense," clothing him with broad powers of control over the oil industry during the emergency, and in particular charging him with making certain that "the supply of petroleum and its products [shall] be accommodated to the needs of the nation and the national defense program," and with recommending to the president measures to assure the "continuous ready availability of petroleum or petroleum products for military and civilian needs." In December, 1942, the coördinator's office was abolished by executive order and replaced with a Petroleum Administration for War, with the secretary of the interior continuing as administrator; and to this Administration were given sweeping powers over the petroleum industry, with special authority to prescribe and regulate oil and gasoline rationing whenever and wherever shortages exist. Avoidance of waste is, of course, a consideration, but the object of the new wartime machinery is primarily to encourage regular production and to see that the product is distributed and used in accordance with war needs.¹

Arkansas, Colorado, Illinois, Kansas, Kentucky, Louisiana, Michigan, New Mexico, New York, Oklahoma, Pennsylvania, and Texas—together producing some eighty per cent of the country's oil. An Interstate Oil Compact Commission created by the original agreement, and with headquarters at Oklahoma City, carries on investigations, and in other ways promotes the objects of the compact, although without compulsory powers. See W. D. Webb, "The Interstate Oil Compact; Theory and Practice," *Southwestern Soc. Sci. Quar.*, XXI, 293-301 (Mar., 1941).

¹ In order to relieve a possible shortage of oil and oil products in the defense production areas of the Atlantic seaboard, Congress, in June, 1941, authorized condemnation of rights of way across ten states for a pipe-line to supply Eastern refineries with crude oil from Texas. (55 *U. S. Stat. at Large*, 610.) Under this authority and with the approval of the petroleum administrator for war, the Defense Plant Corporation of the R.F.C. financed the construction of the world's largest oil-carrying pipe-line—"Big Inch"—to pump crude oil some 1,400 miles from the oil fields of eastern Texas to refineries in the New York and Philadelphia areas. The completion in record time of this 24-inch pipe-line in July, 1943, started a flow of 700,000 barrels of crude oil daily to the Atlantic coast. A smaller 20-inch pipe-line from Texas to the same Eastern areas is a companion to Big Inch, being designed to carry gasoline, fuel oil, and other refined products. The construction of these pipe-lines, one of the most remarkable engineering feats of wartime, not only benefited war industries, but released many ocean-going tank-ships from the long water-haul from Gulf Coast ports.

Considered of great potential importance at the time was a \$130,000,000 American-financed oil project, "Canol," consisting of nearly six hundred miles of four-inch above-ground pipe-line to carry oil from wells at Fort Newman in Canada over the Arctic Continental Divide to a refinery at Whitehorse in Alaska. This construction was undertaken, with the consent of the Canadian government, as an emergency measure when enemy action threatened the lines of supply to the United States forces in Alaska. The precaution proved less necessary than anticipated, and some demand has been voiced in Congress that the project be abandoned.

In April, 1944, the President signed a synthetic liquid fuel bill designed to reduce

Of fundamental importance, too, are the arable-land and fresh-water resources of the country; and in later years attention has been turned likewise to conserving them. Floods and sand-storms have driven home in a tragic manner the need for adopting special measures for soil preservation, especially in large areas of the Middle West and Southwest; and devastating droughts have imparted a similar significance to measures for water conservation. In April, 1935, Congress set aside funds for the prevention of soil erosion and for flood control; and a Soil Erosion Act¹ passed shortly afterwards declared it to be the national government's policy to provide permanently for the control and prevention of erosion on farm, grazing, and forest lands. Administration of the measure falls to a Soils Conservation Service in the Department of Agriculture, cooperating with more than nine hundred soil conservation districts organized under state laws. As we have seen, too, soil conservation is the heart of the Soil Conservation and Domestic Allotment Act of 1936.²

Soil con-
servation.

Hardly less requisite to the nation's livelihood are its fresh-water resources, and numerous agencies of the national government are, in various degrees and ways, concerned with them.³ The matter presents itself in two main phases—the control of situations in which there is danger of too much water, i.e., floods, and the husbanding of meager supplies in areas subject to drought. The public has long been aware of the menace of floods, especially in the valleys of the Ohio, Missouri, Colorado, and Mississippi rivers, and more recently in New England; and since the great Mississippi Valley flood of 1927 the national government has spent more than a billion dollars on flood-control works in various parts of the country, with further liberal outlays authorized. The states, too, are more or less active, and after Congress, in 1936, authorized any two or more of them to enter into flood-control compacts, Massachusetts, Connecticut, New Hampshire, and Vermont promptly signed an agreement for flood control in the valleys of the Connecticut and Merrimac,

Water con-
servation

dependence of the United States upon foreign sources of petroleum after the war. The act authorized expenditure of thirty millions on government experimental plants for the production of synthetic liquid fuel from coal and oil shales, and from agricultural and forest products. New processes that may be developed will be made available for use by individuals and corporations without payment of royalties. *Public Law 290—78th Cong., 2nd Sess.*

¹ 49 U. S. Stat. at Large, 163. See p. 573 above.

² Counting all types of land throughout the country, soil erosion has ruined or seriously impoverished approximately 282,000,000 acres; while from an additional 775,000,000 acres it has stripped from one-third to three-fourths of the topsoil. A few years ago, 200,000 acres were being virtually destroyed each year and the fertility of a still larger area steadily impaired.

For about ten years, an important agency employed in soil conservation and related work was the Civilian Conservation Corps, set up originally to help solve the unemployment problem during the depression of the thirties. Congress, in 1942, however, provided for the C.C.C.'s liquidation in the following year.

³ A few years ago, seven of these agencies were in the Department of Agriculture, eight in the Department of the Interior, two each in the State, Treasury, and War Departments, and nine in various independent establishments. National Resources Committee, *Progress Report*, June 15, 1936, p. 35. Some have since been transferred.

and Minnesota and the Dakotas followed with a compact for similar control in the valley of the Red River of the North.¹

Scarcity of water, on the other hand, until a decade ago, presented no problem sufficiently serious to evoke wide public concern, apart from irrigation activities in the Far West. But destructive droughts and devastating sand-storms in the summers of 1934 and 1936 dramatically stressed the need for conserving and enlarging the water resources of a vast area—the “dust bowl”—lying in the Great Plains region.² Surveys of this drought-stricken territory revealed that a chronically serious condition had been growing worse; that large stretches of once fertile land were being turned into desert because of being over-grazed, and because surface protection had been removed by unscientific farming; and that good rainfall in the region, far from being a blessing, might only add to the nation's impoverishment by carrying away still more of the topsoil. In this phase of conservation, a good beginning has been made.

Beginning in 1934, state and federal governments have been cooperating in formulating measures to alleviate, and ultimately to prevent, the recurrence of drought conditions; and a comprehensive anti-drought program has been worked out by the forestry, soil conservation, and reclamation services, together with the Farm Security Administration.³ The feature of the program thus far of largest benefit has been the emphasis placed upon water conservation through proper irrigation and water storage, in consequence of which, reported President Roosevelt as long ago as 1936, “thousands of ponds or small reservoirs have been built in order to supply water for stock and to lift the level of the underground water to protect wells from going dry. Thousands of wells have been drilled or deepened; community lakes have been created; and irrigation projects are being pushed. Water conservation by such means is being expanded . . . all through the Great Plains area, the western corn-belt, and the states that lie farther south.”⁴

¹ See a group of articles by C. H. Pritchett, G. F. Yantis, *et al.*, under the general title of “River Resources; Use and Control,” *State Government*, XVIII, 19-35 (Feb., 1945).

² More specifically, the “dust bowl” of 1934-36 was in the southwestern part of Kansas, the southeastern part of Colorado, the Panhandle of Oklahoma and Texas, and the northeastern portion of New Mexico.

³ Correction of the conditions described, it should be remembered, is the primary object of the production-control system set up under the Soil Conservation and Domestic Allotment Act of 1936 (see p. 574 above). Following the drought and sand-storms of 1934, the President, by executive order, created the Plains Shelterbelt Zone, and outlined a plan for planting a “belt” of trees about one hundred miles wide and extending nearly a thousand miles from North Dakota to Texas; and under supervision of the Forest Service nearly two hundred million trees were planted in the next six years, partly to serve as protection against wind erosion of soil, and partly to give employment and relief to many needy residents of the drought-stricken areas.

⁴ *N. Y. Times*, Sept. 7, 1936. Following the report of a temporary Great Plains Drought Area Committee in August, 1936 (summarized in *N. Y. Times*, Aug. 28, 1936), the President appointed a Great Plains Committee, with Morris L. Cooke, administrator of the Rural Electrification Administration, as chairman, and in December of the same year, this committee submitted a report covering every angle of the drought problem in the ten Great Plains states where the major disaster of 1936

The great river systems with which the United States is favored afford almost limitless opportunities for the harnessing and utilization of water-power; and so long as their policies do not conflict with federal rights, the states may control hydroelectric power generation and transmission as they like. In a number of ways, however, the national government has been drawn into this same field of activity. To begin with, the War Department has supervision over dams and other structures affecting the navigability of inland waters. In the second place, there is full national authority to control the construction and use of hydroelectric plants on streams flowing through the public domain. A third national right is that of regulating the transmission of electricity across state boundaries. And a fourth form of activity is government building of dams in key locations on great rivers, with a view not only to production of power but also to flood control, irrigation, and improvement of navigation, notably in the basins of the Tennessee, Colorado, and Columbia rivers.

Hydro-
electric
power

Recognizing that altogether too loose a policy had been pursued in disposing of power sites on the public domain and on navigable rivers elsewhere, Congress, in 1920, set up a Federal Power Commission composed of three cabinet members, and ten years later replaced it with a new body of five members (appointed by the president and Senate) endowed with authority to license the construction of hydroelectric plants, to regulate the marketing of securities of private utilities engaged in interstate commerce, and to control services and rates of such utilities—in other words, with approximately the same functions that the Interstate Commerce Commission exercises with respect to railroads.¹ Enactment of the Natural Gas Act of 1938 extended the Commission's jurisdiction to include interstate transportation and sale of another important energy source—natural gas.² And the Flood Control Act of the same year further enlarged the Commission's powers to include multiple-purpose river-basin planning, and likewise development of hydroelectric power in flood-control dams constructed by the War Department.³

The
Federal
Power
Commis-
sion

The most striking aspect of national hydroelectric activity in recent years has, indeed, been the carrying out of great power projects directly by the government; and in nearly all cases, power production has been planned to be accompanied by developments in conservation, navigation, flood control, reforestation, irrigation, and national defense. Under New Deal leadership, an immediate objective (at all events during the worst stages of the great depression) was to supply stimulus to the capital industries furnishing the materials used. But the larger, long-term objectives have been, of course, to promote the social and economic better-

Develop-
ment of
federal
power
projects

occurred. The report was transmitted to Congress in February, 1937, and printed as 75th Cong., 1st Sess., House Doc. No. 144.

¹ Federal Power Act, 41 U. S. Stat. at Large, 1063.

² 52 U. S. Stat. at Large, 821. See the Commission's *Report* (1940), 9-10. The constitutionality of the Federal Power Act was upheld by the Supreme Court in December, 1940, in *United States v. Appalachian Power Co.*, 311 U. S. 377.

³ 52 U. S. Stat. at Large, 1215.

ment of the areas served, to enhance the national well-being, and, incidentally, to help solve the nation-wide problem of cheap electric services for the masses.¹

The
Power
Commis-
sion and
national
defense

In addition to its peacetime activities, the Commission has been given numerous functions in connection with national defense and prosecution of the war. Thus it is authorized to declare a power emergency or shortage, and to call for immediate curtailment of street and ornamental lighting (as indeed of all other non-defense uses of electricity); also to order such linking up of facilities for generation and transmission of electric energy as will, in its judgment, best meet the emergency and serve the public interest. From the beginning, too, the basic Federal Power Act has provided that the United States may take over and operate any licensed hydroelectric project upon a written order of the president asserting that national security demands such action "for the purpose of manufacturing nitrates, explosives, or other munitions of war, or for any other purpose involving the safety of the United States."

The Tennessee Valley Authority

Origin
and
purpose

Our review of federal conservation policies and measures may, perhaps, be most fittingly concluded with a closer look at a group of enterprises—the "keystone of the New Deal arch"—undertaken during the past decade in the valley of the Tennessee River. Developments at Muscle Shoals (on the middle Tennessee) during the first World War, and designed for the extraction of nitrogen from the air for use in manufacturing explosives, left the national government the owner of 2,300 acres of land, two nitrate plants, a power house, and Wilson Dam. Later years saw much controversy over the use, if any, to be made of this property; and little progress toward a solution was attained until, at the request of President Roosevelt, Congress in 1933 passed a Tennessee Valley Authority Act,² aimed at improving the navigability and promoting flood control of the Tennessee, providing for reforestation and proper use of marginal lands in the Tennessee Valley, encouraging the Valley's agricul-

¹ The Tennessee Valley Authority Act (commented on below), the Bonneville Project Act (50 *U. S. Stat. at Large*, 731), and the Fort Peck Project Act (52 *U. S. Stat. at Large*, 403) may be cited as examples of statutes providing for public hydroelectric power projects, each subject, in various phases of its operations, to the supervision and authority of the Federal Power Commission. Few government agencies are under heavier pressure from private interests (in this case, the great utility companies). But the Commission—although coming on the scene somewhat belatedly—has stood guard in a very useful way over the nation's water-power and gas resources, and in addition has served a good purpose in preparing well-considered plans for developing such resources in the future. See R. D. Baum, *The Federal Power Commission and State Utility Regulation* (Washington, 1942); and for the results of an extended expert survey of the relations between the federal and state governments and the power industry, E. E. Hunt ed., *The Power Industry and the Public Interest* (New York, 1944).

² 48 *U. S. Stat. at Large*, 58. For amendments to the act, see 49 *U. S. Stat. at Large*, 1075 (1935); 53 *ibid.*, 1083 (1939); 54 *ibid.*, 626 (1940). Cf. C. H. Pritchett, "The Development of the Tennessee Valley Authority Act, *Tenn. Law Rev.*, XV, 123-141 (Feb., 1938).

tural and industrial development, assisting national defense by operating government-owned nitrate plants, and indeed pointed toward other objectives not at the moment fully specified. Over an area of 41,000 square miles (four-fifths the size of England), embracing portions of seven states,¹ and having a population of nearly three millions, agriculture and industry were to be reconstructed, forests restored, soil erosion checked, mineral resources developed, cheap power and chemical fertilizers produced, and the inhabitants generally assured the benefits of a "more abundant life"; and to carry out the plan, the Tennessee Valley Authority was incorporated, under a board of three directors appointed by the president, and with a capitalization of fifty million dollars provided at once by Congress and authority to issue bonds on the credit of the United States up to a like amount.² As envisaged by President Roosevelt and by the T.V.A. itself, the project was a supremely significant undertaking in democratic management and in the relatively new art of regional planning, blazing the way, it was hoped, for enterprises of similar nature and scope in other suitable sections of the country. As viewed by people of contrary opinion, it constituted a venture in subsidized governmental competition with private utility and other business which would be unfair, uneconomical, and a flagrant abuse of federal powers.

Although by no means neglecting conservation and development of the region's soil, forest, and mineral resources or promotion of the health, industry, and general well-being of the residents, the Authority has quite naturally focused its efforts thus far mainly upon taming the unruly Tennessee River, thereby promoting navigability, reducing flood hazards, and, in particular, providing great quantities of electric power. Twenty-one huge dams have been built or acquired; others are contemplated; and arrangements have been completed for selling surplus power to states, counties, cities, corporations, and individual consumers, with a view not only to recovering some portion of the huge expenses incurred, but also to providing the much-discussed "yardstick" for measuring the justice of rates charged consumers by private utility companies.³ Contracts with purchasers require the resale of electricity at exceptionally low rates controlled by the Authority; and from 1934 until its liquidation in 1943 as

The
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power
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¹ Tennessee, Virginia, North Carolina, Georgia, Alabama, Mississippi, and Kentucky.

² To 1944, the actual total outlay on the project was about six hundred million dollars.

³ The T.V.A. Act prescribes that preference in the disposition of power shall be given to cooperative associations and municipalities. On July 1, 1944, the Authority had contracts for sale of power at wholesale with eighty municipalities, three counties, and forty-five cooperatives, besides twenty-two privately owned utility companies. With the exception of the private companies, these agencies distribute power to more than half a million ultimate consumers under retail rates agreed upon with the Authority. Power is furnished also to a number of projects, plants, and bases of federal agencies. In fiscal 1944, the Authority returned \$14,116,000 net income to the United States Treasury out of a gross power revenue of \$35,200,000, and after paying various jurisdictions \$2,168,798 in lieu of taxes. *U. S. Government Manual* (Summer, 1944), 555-559; *Annual Report of the Tennessee Valley Authority* (1945), 37-40.

a wartime anomaly, an auxiliary corporation, the Electric Home and Farm Authority, concerned itself with educating potential consumers to an appreciation of the advantages of electrical power and financed them in purchasing electrical appliances at low prices. Agreements entered into with leading private power companies, too, have enabled the Authority to extend its market considerably beyond its own immediate area, and several private utility properties have been purchased outright.¹

Significance
of the
experiment

Serving incidentally as a means of furnishing much employment, and to that extent contributing directly to the war upon depression, the Tennessee Valley undertaking was from the outset more than merely one more measure for national recovery. As observed by a recent writer, the vital question to which it attempts an answer is "whether an industrious and capable people, though settled in a region which contains substantial natural resources, must continue to endure a low living standard," and "by what means is it feasible, if at all, to assist a people fairly rich in primary resources and available skills to achieve higher productivity and an increase in their level of consumption and possessions?"² The enterprise may or may not be followed through on all of the lines originally projected. Even the Authority's power policy cannot as yet be finally assessed: the program has been held up for considerable periods by litigation; construction is still under way; marketing operations on a large scale have only rather lately become feasible. In its first ten or eleven years, the gigantic project has, however, afforded a remarkable spectacle of governmental experimentation, has drawn the national government into new forms of business activity, and has inspired at least a vision of a country refurbished throughout its length and breadth by means of similar enterprises undertaken in appropriate areas. More specifically, in meeting the urgent need for increased electric power to vitalize our defense and war industries since 1940, it has proved an asset of the first importance, particularly helpful being the enlarged fertilizer works at Muscle Shoals and electric power development at the various dams.³

¹ The Supreme Court has handed down two decisions bearing upon the constitutionality of the T.V.A. Act. In *Ashwander v. T.V.A.*, 297 U. S. 288 (1936), the Court held that, having the right to build dams needed for national defense or for the improvement of navigation, the federal government may sell any resulting power, and in order to facilitate such sale, may acquire private transmission systems. Later, in a case in which eighteen private power companies lodged complaint against T.V.A. competition and sought an injunction to end it, the Court upheld the right of the government, through its agent, the T.V.A., to engage in competition with private enterprises. *Tennessee Electric Power Co. v. T.V.A.*, 306 U. S. 118 (1939).

² H. Finer, *The T.V.A., Lessons for International Application* (Montreal, 1944), 1.

³ Products supplied to the various war agencies, chiefly to the War Department, include large quantities of ammonium nitrate, an ingredient of high explosives; pure elemental phosphorous, a material of chemical warfare, particularly for smoke screens; and calcium carbide, an important ingredient of synthetic rubber. In addition, spare capacity has been devoted to the production of plant foods, both phosphatic and nitrogenous, to meet food quotas for the Allied Nations. The operation of dams has enabled the Authority also to meet the increased demand for electric power for war production and other uses, has led to greatly increased use of the Tennessee

Soil conservation, forest conservation, flood control, conservation of water, oil, and natural gas, and the development of hydroelectric power sites present a series not of isolated, but of closely interrelated and overlapping, problems affecting the entire country; and adequate solution of them is conditioned upon planning on a nation-wide scale.¹ To the leadership of the New Deal must go credit for a keen awareness of this fact; and, starting with the establishment of a National Planning Board in July, 1933, comprehensive studies of land use, stream use, mineral resources, and related matters were carried on over a period of a decade; while practically all of the states were influenced or induced, on their part, to set up planning boards or commissions for similar work.² From the federal Planning Board evolved, in 1939, a National Resources Planning Board (in the Executive Office of the President), with three members appointed by the president and Senate;³ and in promoting the ensuing defense and war effort, this board coöperated actively with the Office of Production Management, the War Production Board, and other agencies on studies related to the location of war industries, and with state planning boards and defense councils on special community problems. It also devoted much attention to the postwar period, with a view to developing plans for necessary readjustments, and in 1942-43 presented to the President two illuminating reports (climaxing a lengthy list of earlier publications)—one entitled *National Resources Development Report for 1943*, in which were outlined some of the major problems to be faced and some of the steps which would need to be taken in effecting an orderly transi-

National
planning

River channel for water transportation, and has reduced danger of damage by floods. Of the power delivered, seventy-five per cent has gone directly into the manufacture of war materials, such as aluminum, copper, and heavy chemicals, or into other war-time uses. See *Annual Report of the Tennessee Valley Authority* (1943), 1-35.

A good brief discussion of the T.V.A. will be found in M. Fainsod and L. Gordon, *Government and the American Economy* (New York, 1941), Chaps. x, xx. The literature of the subject is very extensive. Four excellent recent books are listed on p. 599 below.

Convinced of the high value, both local and national, of the Tennessee Valley development, President Roosevelt, in September, 1944, recommended the creation of a Missouri Valley Authority along the lines of the T.V.A., to develop the water and other resources of nine Western states, and at the same time renewed pleas made in June, 1937, for setting up similar development organizations for the Arkansas and Columbia River basins. In March, 1945, he requested an appropriation for preliminary work on the Missouri River project, and a bill on the subject was referred for study to three different committees of the House of Representatives.

Of somewhat similar nature is the St. Lawrence deep waterway and power project, for which President Roosevelt repeatedly sought authorization. A treaty on the subject with Canada was rejected by the Senate in 1934; an executive agreement on similar lines was refused approval in 1941; and the latest repulse of the project came in December, 1944, when, after the proposal had been offered as an amendment to a pending rivers and harbors bill, the Senate defeated it by a vote of 56 to 25. The project, of course, could not be carried out without congressional appropriations.

¹ H. A. Wallace, "Wanted: A Master Conservation Plan," *N. Y. Times*, May 5, 1940.

² See list in *The Book of the States* (Chicago, 1943), V. 225. It is but fair to recognize that something in the nature of the National Planning Board was suggested by President Hoover's Committee on Recent Social Trends, reporting in 1933.

³ The members in later years were Frederic A. Delano, Professor Charles E. Merriam, of the University of Chicago, and George F. Yantis.

tion from war to peace and for the longer-range development of an expanded economy, and the other bearing the challenging title of *Security, Work, and Relief*. The latter document received considerable attention from the press and public, but both encountered an unfortunately frigid reception in Congress; and, moved by political animus against an activity regarded as preëminently "New Dealish," Congress not only terminated the Board in 1943 by cutting off its funds, but barred the president from utilizing any substitute for it by rather childish stipulating that the functions previously exercised should not be transferred to any other agency or performed "except as hereafter provided by law." Fortunately, the great amount of useful material assembled and published by the Board and its forerunners since 1933 remains available to those, including Congress itself, who, after all, cannot escape wrestling with many of the very problems to which the Board thoughtfully addressed itself.¹

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CHAPTER XXXI

THE GOVERNMENT AND LABOR

Labor's
consti-
tutional
status

The relation between worker and employer is of a legal nature, and on that account, as well as because the conditions under which work is carried on fall broadly within the scope of the police power, labor is a fit and necessary subject for government supervision and regulation. Under our American system, control in this domain belongs primarily to the states; and from fairly far back, most states have built up more or less extensive sets of labor laws, covering such matters as hours, wages, safety devices, collective bargaining, settlement of disputes, and compensation for injury. As in the case of agriculture, the federal constitution makes no mention of the subject. Here again, however, silence by no means precludes action. On the contrary, the broad authority of Congress to tax and to appropriate money has opened wide avenues for federal control over the conditions under which industrial and other labor is performed; still more authority has flowed from the power to regulate interstate and foreign commerce, with which, under the changes wrought by technology and by ever-widening judicial interpretation, more and more of labor's rank and file is connected; the national government naturally has full right to regulate labor performed in its own service; and even the ordinarily free scope of the states is many times restricted by judicial construction of "due process" and other principles embodied in the federal constitution.

The
federal
govern-
ment
develops
control

The upshot is that for more than sixty years the national government has increasingly supplemented state control with protective and other regulatory activities affecting the nation's wage-earners. As early as 1882, Congress enacted a Chinese exclusion law (in force until during the present war) as a restriction upon the inflow of competitive labor; and three years afterwards a measure was added debarring alien laborers, of whatever nationality, if under contract to individuals or corporations. Creation of a Department of Commerce and Labor in 1903 further reflected federal interest in labor; and ten years later the influence of labor was strong enough to bring about the establishment of a separate Department of Labor, the present head of which (1945) is the first woman in the country's history to hold a cabinet post. In sweeping language, the functions of the new Department were declared to be "to foster, promote, and develop the welfare of wage-earners of the United States, to improve their working conditions, and to advance their opportunities for profitable employment"; and in increasing degree, as time has passed, the

Department, in conjunction with Congress and with a variety of agencies in other executive departments or outside, and backed up by friendlier courts than in earlier days, has concerned itself with fostering, promoting, and developing the well-being of the country's working people, as well as to some extent with protecting the rights and interests of other people against abuses of which labor itself might be guilty.¹

As a result, labor, although often enough manifesting discontent, has come to occupy a very favorable position in this country. And to no small degree it has done so through the use of its own political power. To be sure, there has not arisen, as in Britain, a labor party contesting elections and presenting a more or less united front in legislative halls; in the main, the country's wage-earners have always preferred to be identified with one or the other of the two older major parties. But this does not mean any lack of political effort, channeled through these older parties, or sometimes through blocs cutting across them, and expressing itself in supporting or opposing presidential, congressional, and other candidates, contributing to campaign funds (even if now under restriction), planning and urging legislation, lobbying on a grand scale in Washington and in state capitals, and, in general, employing whatever means and devices may give promise of advancing the interests which wage-earners, or at all events their leaders, have at heart. In the past ten years, such efforts have sometimes been impeded by sharp divisions within labor's own ranks, especially between the older and more moderate American Federation of Labor and the younger and more radical Congress of Indus-

Labor's
political
status .

¹ Most of the Department's bureaus and services will be dealt with at appropriate points as we proceed. The more important include (1) a Bureau of Labor Statistics (dating actually from 1888), which collects and makes available (through the *Monthly Labor Review*, bulletins, and monographs) data pertaining to the labor supply, labor productivity, hours, wages, prices and cost of living, strikes and lockouts, labor laws and court decisions, women in industry, industrial accidents, workmen's compensation, and other labor interests both in this country and abroad; (2) a Children's Bureau (dating from 1912) charged with investigating and reporting upon "all matters pertaining to the welfare of children and child life among all classes of our people," and giving attention especially to problems of child hygiene, child dependency, child employment in industry, and juvenile delinquency; (3) a Women's Bureau, created in 1920 to "formulate standards and policies which shall promote the welfare of wage-earning women, improve their working conditions, increase their efficiency, and advance their opportunities for profitable employment," and occupied with investigating conditions of women in industry, conferring and cooperating with state departments of labor, holding public conferences, and carrying on research on a wide variety of topics connected with the well-being of the millions of women throughout the country who are employed in gainful occupations; (4) a Division of Labor Standards, established in 1934, and acting as a service agency to state labor departments, to industrial commissions, and to labor, civic, and social groups interested in the improvement of working conditions; (5) a Wage and Hour division, charged with enforcing the Fair Labor Standards Act of 1938, to be explained below; (6) a Public Contracts Division, which enforces the Walsh-Healey Act of 1936 regulating labor conditions in connection with government supply contracts; and (7) a U. S. Conciliation Service, concerning itself since 1913 with efforts to preserve industrial peace. Since 1943, the Wage and Hour and Public Contracts Divisions have been headed by a single "administrator." See J. A. Tobey, "The Children's Bureau," *Service Monographs*, No. 21 (Baltimore, 1925); G. H. Weber, "The Women's Bureau," *ibid.*, No. 22 (Baltimore, 1923); J. Lombardi, *Labor's Voice in the Cabinet; A History of the Department of Labor from Its Origin to 1921* (New York, 1942).

trial Organizations;¹ and the dealings of both management and government with labor are often obstructed by the lack of any single individual or group that can speak authoritatively for labor interests as a whole. This, however, has not prevented labor pressures from exerting a tremendous influence upon national and state legislative and other policy. An outstanding feature, indeed, of the Roosevelt administrations was the favor habitually shown labor viewpoints and objectives, even if one cannot always be sure about the precise extent to which the attitude was dictated by sympathetic instinct and conviction and, on the other hand, by considerations of political expediency. Without doubt, both factors played a part. But, however, that may be, of the power of labor's voice in these later years—even if not always a united voice—the pages that follow will give abundant evidence.

Regulatory Measures Before 1933

1. For
govern-
ment em-
ployees

At all times, a large proportion of federal activities relating to labor have been devoid of the element of regulation in any strict sense, being directed rather to compiling information, promoting employment, adjusting disputes, and rendering other such services. Nevertheless, with the coming of the New Deal that element was increasingly injected. Indeed, even earlier, Congress enacted a number of measures aimed directly at regulating labor conditions in one domain or another; and, the national government being the largest employer of labor in the country (if not in the world)—and likewise possessed of unquestioned authority to deal with its employees—such measures naturally first had to do with the government's own workers. As far back as 1840, the government became "an ensample to righteousness," when President Van Buren, by executive order, established "the ten-hour system" for federal employees on public works. In 1868, Congress fixed eight hours as a day's work for all "laborers, workmen, and mechanics" employed by the government; and in later years the eight-hour day (seven hours for clerical employees) became universal throughout the government service. Under the Walsh-Healey Act of 1936, indeed, contractors doing work for the government must also give their employees the benefit of the eight-hour day.

2. For
laborers
in pri-
vate em-
ployment

Taking advantage, too, of its commerce power, Congress a good while ago began enacting protective legislation for important labor groups other than employees of the government and of government contractors. Thus, in 1907 an Hours of Service Act limited to sixteen the hours of consecutive work of persons having to do with the interstate movement of railway trains; and the Adamson Act of 1916, passed at the behest of the railway

¹ At the opening of 1945, the A. F. of L. reported 6,631,000 dues-paying members and the C.I.O. somewhat less, i.e., 6,435,000. There are also sizeable well-organized groups affiliated with neither, as, for example, the four railroad brotherhoods, with a combined membership of 420,000, and the United Mine Workers of America, with 600,000.

brotherhoods, introduced the eight-hour day—again, of course, only for persons engaged in interstate railway service. An Employers' Liability Act of 1908, applying to all employees engaged in interstate commerce, substituted genuine relief for the academic relief afforded by common-law rules which, under the old doctrines of "contributory negligence" and "assumption of risk," enabled carriers largely to escape liability for injury or death suffered by their workmen in performance of duty. The La Follette Seamen's Act of 1915 extended to a large class of employees previously subjected to almost incredible hardships and deprivations important safeguards such as suitable diet and regular payment of wages; and in 1920 the benefits of the Employers' Liability Act, too, were conferred upon seamen.

In a different direction, protective efforts were for a long time less successful, because of difficulty with the courts. When, in 1916, Congress undertook to restrict child labor in factories by excluding the products of such labor from interstate commerce, the Supreme Court held the measure void as regulating manufacturing rather than commerce;¹ when, in 1919, another effort was made, on the basis of the taxing power, the result was similar, although of course on different grounds;² and when, in 1918, a minimum-wage law for women and children in the District of Columbia was placed on the statute-book, it, too, fell before a judicial ruling that adult women were being deprived of liberty guaranteed them by the constitution.³ As will appear presently, the object of the earlier ill-fated child labor legislation has since been to a considerable extent attained through the Fair Labor Standards Act of 1938, upheld unanimously by a differently constituted and differently minded Court.⁴

Of federal labor legislation on more general lines, the most important before the New Deal era was embodied in (1) certain clauses of the Clayton Anti-Trust Act of 1914 declaring human labor to be not a "commodity or article of commerce," exempting labor organizations from the anti-trust laws, and restricting the use of injunctions in labor disputes; and (2) the Norris-La Guardia Act of 1932, making "yellow-dog" contracts⁵ unenforceable in the federal courts, and expressly forbidding the courts to issue injunctions against laborers for striking, for using union funds in aid of a strike, or for inciting others to strike—unless the employer can show that he has made "every reasonable effort" to settle the strike or that unlawful acts have been committed or threatened by the strikers. The Clayton Act proved a great disappointment to labor,

8. For women and children

Protection against injunctions

¹ *Hammer v. Dagenhart*, 247 U. S. 251 (1918). See p. 532 above.

² *Bailey v. Drexel Furniture Co.*, 259 U. S. 20 (1922).

³ *Adkins v. Children's Hospital*, 261 U. S. 525 (1923).

⁴ See pp. 610-612 below.

⁵ Contracts by which laborers bind themselves not to join a trade union. See M. J. Segal, *The Norris-La Guardia Act and the Courts* (Pamphlet, Washington, D. C., 1942); M. G. Ratner and N. J. Come, "The Norris-La Guardia Act in the Constitution," *Geo. Washington Law Rev.*, XI, 428-472 (June, 1943).

because the courts whittled away most of the benefits expected to accrue from it.¹ Most labor legislation, however, has been relatively effective.

Labor Under the New Deal

Relations between the national government and labor have grown decidedly closer since 1933, and along several distinct, although related, lines. (1) Far-reaching efforts have been made by the government to promote employment, and in particular to reduce and relieve the widespread unemployment characteristic of the depression period. (2) Labor standards have been advanced through legislation requiring collective bargaining between employers and employees and instituting a system of minimum wages and maximum hours. (3) Child labor has been sharply reduced. (4) Older agencies have been strengthened, and new ones (notably the War Labor Board) have been created, to promote industrial peace. (5) A Social Security Act of 1935, with later amendments, has erected an imposing structure of safeguards against unemployment, penury in old age, and other ills particularly menacing to workers. (6) Significant beginnings have been made toward providing improved housing for wage-earners living in city slum areas. The remainder of the present chapter, and the chapter that follows, will be devoted to comment on these various matters.

The Promotion of Employment

A succession of efforts and agencies

A prime requisite in industry is bringing the worker and the job together, and for achieving this end a bewildering variety of employment agencies have made their appearance. Some have been conducted by individual employers or employer associations; some have been maintained by labor organizations; many have been private profit-seeking enterprises. Even under regulation, however, private agencies long ago showed serious defects, and as early as 1890 public agencies began coming into the field. For a time, these took the form chiefly of employment offices set up and operated by states. During the first World War, however, an acute labor shortage led to the creation of a U. S. Employment Service in the federal Department of Labor; and although it proved so ineffective that it was soon discontinued, a New Deal measure of 1933 reinstated it on a broader and more satisfactory basis. In 1939—the Social Security Act of 1935 having introduced a nation-wide system of unemployment compensation—the Service was incorporated as a unit into the machinery of the Social Security Board having to do with that matter and known as the Bureau of Employment Security. Under this arrangement, the broadened Bureau was charged with developing a national system of employment offices and with assisting in establishing

¹ E. B. McNatt, "Labor and the Anti-Trust Laws; The Apex Decision," *Jour. of Polit. Econ.*, XLIX, 555-574 (Aug., 1941); L. B. Boudin, "Organized Labor and the Clayton Act," *Va. Law Rev.*, XXIX, 271-315 (Dec., 1942), and 395-439 (June, 1943).

and maintaining systems of public employment offices in the states; and for the latter purpose federal funds were made available, matching the expenditures of states and localities. With a view to the more effective mobilization of manpower for war, all state employment services were, on January 1, 1942, transferred to full national control. Further, in the following April, the President created a nine-man War Manpower Commission to "bring about the most effective mobilization and maximum use of the nation's manpower"; and thereupon the Employment Service and all other machinery and functions of the Social Security Board having to do with employment were transferred to this Commission, where they became parts of a Bureau of Placement concerned with developing programs and policies for recruiting workers and placing them in both industry and agriculture.¹

In the situation in which the country found itself during the depression of the thirties, with anywhere from ten to thirteen million able-bodied workers unemployed, the normal operations of employment services such as then existed could by no means suffice; and the government embarked upon a huge program of relief, not only by direct grants, but through work which it itself provided, and for which it furnished part or all of the funds. Indicating as one of its main objectives the reduction of unemployment, the National Recovery Act of 1933 created a Public Works Administration and gave it the sum of \$3,300,000,000 with which to initiate public construction and to finance self-liquidating semi-public building. Later in the same year, a Civil Works Administration, and in 1935 a successor, the Works Progress Administration (subsequently known as the Work Projects Administration), were instituted, with billions put at their disposal; and hardly an important community throughout the country is now without some building or other improvement into which this federal money was poured and on which people otherwise workless were employed. A swift and sweeping change in the employment situation resulting from defense and war activities after 1940, however, rendered such devices superfluous; and by direction of the President, given late in 1943, the Work Projects Administration is now (1945) in process of liquidation. Every one who contemplates the possibilities of coming postwar years recognizes that some new program of the kind may unhappily become necessary.²

Two employment enterprises were developed especially for the benefit of the country's youth. Under the auspices of the Civilian Conservation Corps, for which Congress began appropriating money in 1933, hundreds of thousands of selected men between the ages of seventeen and twenty-eight were enrolled in upwards of two thousand conservation camps,

Special devices during the depression.

1 Encouragement of public works

2. The Civilian Conservation Corps

¹ Under this arrangement, the U. S. Employment Service, consisting essentially of the state employment services taken over by the national government, still retains a certain identity.

² A. W. Macmahon *et al.*, *The Administration of Federal Work Relief* (Chicago, 1941).

located in all sections of the country, and did much to improve the national parks and forests, to protect them from losses through fire and the ravages of insects and plant diseases, to develop in them more adequate recreational facilities, and to promote soil conservation and flood-control projects. Although engaged in part upon engineering tasks on military reservations, and obviously containing possibilities of permanent usefulness, the C.C.C. was nevertheless ordered by Congress in 1942 to be liquidated, allegedly in the interest of economy; and it passed out of existence in the following year.¹

3. The
National
Youth
Adminis-
tration

A National Youth Administration was created by executive order in 1935, as part of the existing Works Progress Administration;² and the organization operated along two lines: (1) a student work-program, providing work and financial assistance to needy young persons desirous of continuing their education; and (2) an out-of-school program for needy unemployed youth, providing work experience through a nation-wide system of work projects and preparing the beneficiaries for private employment. During eight years, some two million young persons were aided under the first program, and more than two and one-half million under the second. However, the Youth Administration, too, fell under the axe of congressional economy and on January 1, 1944, ceased to exist.³

Improvement of Labor Standards—Collective Bargaining

Under
the
N.R.A.

One of the many objects of the National Recovery Act of 1933 was "to improve standards of labor"; and to this end, the codes of fair competition, as adopted by various industries and approved by the president, were required to set minimum wage levels, fix maximum hours of work, eliminate child labor, and in other ways improve the standards and working conditions of laborers. Every code, too, must not only recognize the right of employees "to organize and bargain collectively through representatives of their own choosing,"⁴ but also protect every employee or other person seeking employment against being required, as a condition of employment, "to join any company union or to refrain from joining." The government thus unequivocally adopted the policy of encouraging the growth of labor unions as instrumentalities by which employees might compel employers to pay adequate wages and maintain proper working conditions; and the provisions of the Norris-La Guardia Act were

¹ Captain X, "A Civilian Army in the Woods," *Harper's Mag.*, CLXVIII, 487-497 (Mar., 1934); C. P. Harper, *The Administration of the Civilian Conservation Corps* (Clarksburg, West Va., 1939).

² But transferred in 1939 to the Federal Security Agency (see p. 413 above), and in 1942, to the War Manpower Commission, where it functioned in the Bureau of Training until its liquidation.

³ All projects not contributing directly to the winning of the war—such as sewing, music, art, and recreation—were indeed discontinued in February, 1942. For an extended account of the organization and work of the N. Y. A., see *Final Report of the National Youth Administration* (1943), and cf. L. L. Lorin, *Youth and World Programs; Problems and Policies* (Washington, D. C., 1941).

⁴ W. H. Spencer, *Collective Bargaining Under Section 7(a) of the National Industrial Recovery Act* (Chicago, 1935).

strengthened by forbidding the use of "yellow-dog" contracts in any manner.

Many of the gains expected to be realized were placed in jeopardy when, in 1935, large portions of the Recovery Act were voided by the Supreme Court. Promptly in the same year, however, Congress, in response to urgent labor demand, and invoking its commerce power, passed a National Labor Relations [Wagner] Act¹ which salvaged practically the whole of the famous Section 7(a) guaranteeing the right of collective bargaining. "The policy of the United States," it was declared, is "to eliminate the causes for certain substantial obstructions to the free flow of commerce . . . by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."² To make collective bargaining more universal and effective, the act outlawed "company unions" (ordinarily including all of the employees, and more or less dominated by the company officials); all unions were thenceforth to be fully independent employee organizations.

The
National
Labor
Relations
Act
(1935)

For the enforcement of the law, a National Labor Relations Board of three members (appointed by the president and Senate for five-year terms) was set up as an independent quasi-judicial agency,³ and given two important functions: first, to ascertain and declare who, in any particular plant, are bona fide representatives entitled to speak for the employees in collective bargaining;⁴ and second, to pass upon complaints of violation of employees' rights under the statute. Both forms of action are initiated, not by the Board, but by employees (or, in certain cases, by employers⁵): the first, by filing a petition for the holding of an election to determine the agent to represent them in collective bargaining; the second, by filing a complaint against an employer for denying or abridging employees' rights to organize, for refusing to bargain collectively with labor's chosen representatives, or for engaging in other specified "unfair

The
National
Labor
Relations
Board

¹ 49 U. S. Stat. at Large, 449.

² The act begins with the broad assertion that "the denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or necessary effect of burdening or obstructing commerce." Nothing in the new law is, however, to be construed so as to "interfere with, or impede, or diminish in any way the right to strike. The measure does not apply to national, state, or local-government employees, or to persons subject to the Railway Labor Act of 1926 (see pp. 612-614 below).

³ There had previously been a National Labor Board (1933) and another National Labor Relations Board (1934).

⁴ This responsibility is rendered far more onerous than it otherwise would be by the split between the A. F. of L. and the C.I.O., and in any event it usually becomes advisable for the N.L.R.B. to supervise the employee elections through a field agent sent to the spot.

⁵ Under an amendment to the rules of the N.L.R.B., adopted in June, 1939 (the law itself not covering the point), employers may petition the Board in situations where two or more labor organizations claim a majority, but neither petitions the Board for certification.

labor practices."¹ If, after local investigation by an examiner (with perhaps a hearing in Washington), a complaint is sustained, the Board may issue "cease and desist" orders, which are enforceable in the courts (with the way open for appeals) like similar orders issued by the Federal Trade Commission.

The
question
of con-
stitution-
ality

Inasmuch as the Labor Relations Act undertook to regulate relations between employers and employees without distinguishing in any way between employers engaged in interstate commerce and those not so engaged, the measure's constitutionality was hotly assailed both before and after enactment, and both in Congress and outside. Opponents could not see how, when the test came, the Supreme Court could do otherwise than hold the law to be a regulation, not of commerce, but of labor conditions in manufacturing; and if a long line of decisions reaching back to the Sugar Trust case of 1895 meant anything, the upshot must be a ruling that, since manufacturing was alien to the commerce power, Congress had no authority to enact the legislation in question.²

The
statute
upheld

The outcome, however, was quite otherwise. On April 12, 1937, the Supreme Court handed down decisions in three cases in which employers were charged with having violated the act³—in every instance, the defendant contending, of course, that the statute was unconstitutional. All of the employees, it was shown, operated manufacturing plants to which was brought from other states much of the raw material used, and from which was shipped to other states most of the finished product. The manufacturing, to be sure, was done locally; but the concerns were doing business on a national scale, and strikes or other disorders inevitably had the effect of interrupting the nation-wide flow of commerce. Therefore, concluded the Court—completely reversing its previous attitude, by a five-to-four vote in every case—Congress had, under the commerce clause, full right to pass the Labor Relations Act, and the defendants in the pending cases were responsible for living up to it.⁴

¹ These unfair labor practices are: (1) interference with or coercion of employees in collective bargaining; (2) domination or interference by employers in the formation or administration of any labor organization; (3) discrimination in employment with a view to encouraging or discouraging membership in a labor organization; (4) discharging of, or discrimination against, an employee for filing charges under the act; and (5) refusal to bargain collectively with representatives of employees. In June, 1936, Congress passed a so-called "strike-breakers' act," making it a felony knowingly to transport in interstate commerce "any person with intent to employ such person to obstruct or interfere . . . with peaceful picketing during any labor controversy . . . or the right of collective bargaining." 49 *U. S. Stat. at Large*, 449.

² A few weeks after the law was enacted, a "National Lawyers' Committee," sponsored by the American Liberty League, took the presumptuous course of issuing a manifesto gratuitously advising the country that the act was unconstitutional. See *N. Y. Times*, Sept. 19, 1935. Cf. H. P. Chandler, "The National Labor Relations Act," *Amer. Bar Assoc. Jour.*, XXII, 245-250 (Apr., 1936).

³ *National Labor Relations Board v. Jones & Laughlin Steel Corporation*, 301 U. S. 1 (1937); *National Labor Relations Board v. Freuhauf Trailer Co.*, 301 U. S. 49 (1937); and *National Labor Relations Board v. Friedman-Harry Marks Clothing Co.*, 301 U. S. 58 (1937).

⁴ Two other cases decided at the same time were *Washington, Virginia, and Maryland Coach Co. v. National Labor Relations Board*, 301 U. S. 142 (1937), and *Asso-*

Thus was confirmed the newly found power of Congress to regulate labor conditions and practices whenever it can be shown that they are bound up with the interstate business of the employers;¹ and in taking this step (at the very time when the great controversy over the judiciary's liberalization was going on) the Court went far toward so modernizing its interpretation of the commerce power as to enable the national government to deal adequately with the realities of American business today. Some ground for concern is found, however, in the frankly one-sided nature of the regulations imposed in the Wagner Act. Every unfair practice enumerated is made unfair only if indulged in by employers; nothing is made unfair if done by labor organizations; and in conjunction with various immunities long enjoyed by labor unions and leaders (for example, as against the anti-trust laws), this has contributed to labor disorders interfering seriously with the country's defense effort.² If Congress may protect the flow of commerce by compelling employers to accept collective bargaining with their employees, it would seem logical to protect it also by either requiring unions to become incorporated, so that they might be held responsible for breaches of agreements made through such bargaining,³ or by requiring compulsory arbitration of labor disputes arising in concerns engaged in commerce. To both such proposals, however, labor has been bitterly opposed; and, with its political power both reflected in and enhanced by the Wagner legislation, its voice continues to prevail.

Some
criticisms

This said, it must in fairness be added that much of the clamor precipitated by the legislation of 1935 and the ensuing court decisions arose because of (1) misconception of the basic purpose of the act and (2) occasional faulty administration. The underlying purpose of the measure is to prevent any restriction of the freedom of workers to organize. "It stops right there. Whatever responsibility attaches to a labor agreement, how it is to be enforced, what lawless acts of labor are to be prevented,

Some
redeem-
ing
features

ciated Press *v.* National Labor Relations Board, 301 U. S. 103 (1937). In the former, the Coach Company was admittedly engaged in interstate transportation, and the Court was unanimous in holding that the Wagner Act properly required the Company to bargain collectively with its employees, etc. In the Associated Press case, it was contended that the defendant was not engaged in interstate commerce, and that applying the provisions of the Wagner Act to it amounted to violating the First Amendment by restricting freedom of the press. By a five-to-four vote, the Court held that the gathering and dissemination of news is commerce, and that restrictions imposed by the Wagner Act did not amount to any violation of the freedom in question.

¹ The decisions did not, however, indicate what proportion of a concern's business must be interstate in order to bring the regulative power of Congress into play.

² In this connection, see the sponsor's defense of the act, "Senator Wagner Challenges Critics of His Act," *N. Y. Times*, July 25, 1937; and cf. "Is the Wagner Act Unfair?," *U. S. News*, Feb. 6, 1939, pp. 10-11 (the pros and cons of the issue).

³ The Revenue Act of 1944 included a section requiring labor unions to make public accounting of their fiscal affairs by filing periodical financial statements with the Bureau of Internal Revenue, the intention being to bring some measure of publicity into the handling of union funds, and to protect the individual union member against exploitation by unscrupulous union bosses where they exist.

are left to state and federal laws outside the act itself..."¹ So far as criticisms of the administration of the law are concerned, it should be remembered that "Congress turned over to the Board an exceedingly difficult task without any chart or compass or rule to guide it."² Under the circumstances, mistakes have been made. But there is no justification for the widely repeated charges that the Board has been "running wild," or is "misusing its power," and must therefore be curbed.³

Improvement of Labor Standards—Wages, Hours, Child Labor

The
Fair
Labor
Standards
Act
(1938)

For a long time, the federal government was effectually estopped from dealing with such matters as wages and hours (except for its own employees, and in interstate transportation) by the Supreme Court's insistence that manufacturing, mining, lumbering, and the like were beyond the range of the commerce power; and when the National Recovery Act of 1933 undertook to limit hours and fix minimum wages in industries carried on under the codes, the result was disaster. The 1937 decisions in the National Labor Relations cases, however, showed a change of attitude in the Court; so likewise did decisions of the same year sustaining all vital parts of the Social Security Act. Encouraged by the turn matters had taken, President Roosevelt recommended to Congress the enactment of measures that would put a "floor" under wages (a minimum-wage law) and a "ceiling" over hours of work (a maximum-hours law), and abolish child labor; and his recommendation bore fruit in the passage of the Fair Labor Standards ("Wages and Hours") Act of 1938⁴—the government's most ambitious attempt as yet to regulate working conditions in industry.

¹ G. W. Alger, "Labor Must Decide," *Atlantic Mo.*, CLXV, 758-765 (June, 1940)—a discriminating criticism, as is also L. B. Boudin, "Representatives of Their Own Choosing," *Ill. Law Rev.*, XXXVII, 385-417 (Mar.-Apr., 1943), XXXVIII, 41-78 (May-June, 1943). See also E. Schlesinger, "Repressive Labor Legislation," *Amer. Bar Assoc. Jour.*, XXVIII, 7-19 (Jan., 1942).

² G. W. Alger, *loc. cit.*

³ This statement is borne out by the record of court decisions in appeals taken from the Board's orders or rulings. During the eight years ending June 30, 1943, the Supreme Court and the circuit courts of appeals rendered 481 decisions involving actions by the Board. In 411 of these, the Board was sustained in full or with only slight modification. *Eighth Annual Report of the National Labor Relations Board* (1943), 62. The only cases reviewable by the courts at the instance of employers are those involving unfair labor practices. *Ibid.*, 60-67. On the general subject, see H. O. Eby, *The Labor Relations Act in the Courts* (New York, 1943).

A serious effort to discredit both the act and the Board took the form of a congressional investigation in 1939-40 by a special House committee headed by a hostile critic, Representative W. H. Smith of Virginia. The Smith committee conducted extensive hearings and, on March 7, 1940, reported a series of drastic amendments to the law. A minority of the committee, on the other hand, denounced the majority report, declaring that "not only were these findings and recommendations based on an entire lack of substantial testimony," but that "in many instances there was not a scintilla of evidence to support them." Most of the majority proposals passed the House, but were not acted upon by the Senate. An almost complete change in the personnel of the Board and its higher staff, however, somewhat significantly followed. See 76th Cong., 3rd Sess., House Rep. No. 1902 (1940); W. Gellhorn and S. L. Linfield, "Politics and Labor Relations; An Appraisal of Criticisms of N.L.R.B. Procedure," *Columbia Law Rev.*, XXXIX, 339-395 (Mar., 1939).

⁴ 52 U.S. Stat. at Large, 1060.

The law applies to all concerns (and, with certain exceptions, to their employees) engaged in interstate commerce or in producing goods for such commerce.¹ A minimum wage of twenty-five cents an hour was set for the first year following October 24, 1938, thirty cents an hour for the next six years; and after seven years (in 1945), unless sooner put into operation under specified circumstances, the minimum wage was to be forty cents an hour, except in special cases. During the first three years of the law's operation, more than 800,000 workers obtained wage increases under it. Wages

Forty-four hours a week were set as the maximum during the first year of the law's operation, forty-two hours during the second year, and forty hours after October 24, 1941—with in all cases overtime pay at one and one-half times the regular rate. Hours

In addition, the act deals with child labor by prohibiting interstate commerce in goods produced under conditions of "oppressive child labor"—which means employment of any child under sixteen in manufacturing and mining, or under eighteen in occupations declared by the Children's Bureau in the Department of Labor to be "particularly hazardous... or detrimental to their health or well-being." Children between fourteen and sixteen may be employed in occupations other than manufacturing and mining, provided "such employment is confined to periods which will not interfere with their schooling and to conditions which will not interfere with their health and well-being."² Child labor

Although the Wages and Hours law encountered much hostility in certain quarters, responsible employers, on the whole, fell into line with

¹ Five groups of employees specifically excepted are: (1) agricultural workers, seamen, employees of airlines, street railways, motor-bus lines, interurban railways, and the employees of weekly or semi-weekly newspapers with a circulation of less than three thousand, the major part of which is in the county of publication; (2) persons employed in bona fide executive, administrative, professional, or local retail capacity, or as outside salesmen; (3) persons employed in any retail or service establishment, the greater part of whose sales are within the state where the business is located; (4) persons employed in fishing and the fishing industry; and (5) persons employed in the area of production to handle, prepare, or can agricultural or horticultural commodities, or to make dairy products. In 1941 (on the eve of our entrance into the war), the total number of persons to whom the law applied was approximately fifteen and one-half million. In 1942, the act was held to cover even employees in buildings in which companies doing an interstate business had their offices—such as elevator operators, engineers, watchmen, and porters—inasmuch as such employees were engaged in occupations "necessary to the production" of goods for commerce by the building's tenants. *Kirchbaum v. Walling*, 316 U. S. 517 (1942).

² See p. 554 above. The entire act and the Walsh-Healy Public Contracts Act are administered by the combined Wage and Hour and Public Contracts Divisions of the Department of Labor, headed by an administrator who is assisted by advisory boards, in each industry, representing employers, employees, and the public. See H. November, "Industry Committees Under the Fair Labor Standards Act," *American Federationist*, XLVII, 271-280 (Mar., 1940).

The shortage of manpower resulting from the war made it necessary to relax to a limited extent the standards for minors contained in the Walsh-Healey Act (see p. 556, above). The employment of girls between the ages of sixteen and eighteen on government contract work was authorized in November, 1942, subject to certain specified conditions of employment. *Annual Report of the Secretary of Labor* (1943), 36-40. Cf. J. M. F. Donovan, Jr., "The Practical Administration of the Wage and Hour Act," *Georgetown Law Jour.*, XXXI, 115-145 (Jan., 1943).

it and carried out its provisions faithfully. Calling for vastly increased output in war industries, the national defense and war program later led some employers to demand a relaxation of the maximum work-week. Until February, 1943, the Administration successfully resisted any such change, believing the relatively short work-week, and not the long work-week, the more favorable for efficient and maximum production. At the date mentioned, however, the President yielded and authorized a forty-eight-hour week in war industries.¹ Meanwhile, the constitutionality of the legislation was sustained by the Supreme Court on February 3, 1941, in a unanimous decision directly overruling a decision of twenty-three years earlier invalidating the first federal child labor law.²

The Promotion of Industrial Peace

Throughout all of the years while labor was achieving the great gains which have been outlined (and others yet to be mentioned), losses were suffered, too—and by the general public as well—from lockouts, slow-downs, strikes, and other interruptions and disorders incident to labor-management disputes. In general, there are four ways of settling such disputes: direct negotiation, mediation, arbitration, and litigation. The first usually proceeds independently of government; in the second and third, government may or may not have a hand; in the fourth, government invariably participates, through the courts. For sixty years, our federal government has concerned itself with various phases of the matter—never more than during the present war. And a word needs to be said about this chapter of labor experience: first, as to the handling of the problem at the point where it was first taken up, *i.e.*, in relation to railways; second, as to machinery and methods employed in relation to labor generally; and third, as to the special developments incident to World War II.

The most obvious place for the federal government to start dealing with the problem was in relation to railways, not only because of the disastrous consequences of breakdowns in the country's transportation services, but because, under the commerce clause, there could be no question of constitutional authority to act. As early as 1882, Congress

1. The special case of railway labor:

¹ Many workers in such industries had been putting in more than forty hours a week, but of course receiving overtime pay. The average in such industries during 1942 was indeed not far from forty-eight hours, which, as indicated, eventually became the standard amount.

² The earlier decision was in the case of *Hammer v. Dagenhart*, 247 U. S. 251 (1918), and the one upholding the Fair Labor Standards Act was in that of *United States v. Darby Lumber Co.*, 312 U. S. 100 (1941). The question immediately at issue in the *Darby* case was whether Congress had power to prohibit the shipment in interstate commerce of lumber manufactured by employees whose wages were below a prescribed minimum or whose weekly hours of labor at those wages exceeded a prescribed maximum. See H. A. L., "Constitutional Aspect of the Fair Labor Standards Act of 1938," *Univ. of Pa. Law Rev.*, LXXXVII, 91-105 (Nov., 1938); C. M. Featherston, "The Commerce Clause and the Fair Labor Standards Act," *Geo. Washington Law Rev.*, VIII, 68-80 (Nov., 1939); and a series of articles in *Law and Contemporary Problems*, VI, 321-493 (Summer, 1939).

began legislating on the subject, and one could enumerate a lengthy list of measures devoted wholly or partly to it,—notably the Erdman Act of 1898, the Newlands Act of 1913, the Adamson Law of 1916, and the Transportation Act of 1920, all avoiding attempts at compulsion, but providing increasingly effective machinery for averting or adjusting conflicts. Capping the series was the Railway Labor Act of 1926, which, with amendments adopted in 1934,¹ possibly deserves to be considered the most potent measure for industrial peace in our history. The great purpose of the legislation is to provide, through voluntary action of the parties, for the prompt adjustment of disputes between carriers, including carriers by air (1936), and their employees arising in the interpretation and enforcement of agreements between them that have previously been reached through conferences and negotiations, i.e., collective bargaining;² and to achieve this end, two permanent bodies have been created, with provision also for temporary arbitration agencies and for emergency boards.

a. Legis-
lation

First, there is a National Railroad Adjustment Board of thirty-six members which operates in four independent divisions, three consisting of ten members each, and the fourth of six members, employers and employees being equally represented.³ Each division has jurisdiction over different classes of employment, and is concerned with the settlement of minor grievances of individuals, and with interpreting and enforcing agreements concerning hours, wages, and working conditions. A large number of disputes of this nature are settled every year and attract no public attention.⁴

b. The
National
Railroad
Adjust-
ment
Board

Major disputes, in which the public often is vitally concerned, come before the National Mediation Board (1934), an independent government agency of the first importance, even though having no compulsory authority. The Board's assistance may be invoked by any party to a controversy between carriers and their employees; or it may volunteer

c. The
National
Media-
tion
Board

¹ 44 U. S. Stat. at Large, 577, and 48 *ibid.*, 1185. The constitutionality of the Railway Labor Act was upheld by the Supreme Court in a notable decision rendered in March, 1937 (*Virginian Railway Co. v. System Federation No. 40*, etc., 300 U. S. 515).

² The act imposes upon both carriers and their employees the duty of making and maintaining agreements to govern working conditions. "These collective agreements [numbering over 4,400 in 1943] . . . are, in effect, industrial constitutions and laws adopted by the carriers and their employees for the government of their joint relations; and the adjustment boards [created under the law] are the courts that enforce the laws. Their decisions are final and binding." Thus has been established "a reign of law," which is responsible for "an almost unbroken record of peaceful settlement of labor disputes on the railroads." *First Annual Report of the National Mediation Board* (1935), 36.

³ All divisions maintain headquarters in Chicago, meet regularly, and submit annual reports to the National Mediation Board, to be described presently. Salaries of members are paid by the parties whom they represent.

⁴ In fiscal 1943, the Adjustment Board disposed of 2,900 disputes requiring interpretation of agreements. An unfavorable view of both the Adjustment Board and the Mediation Board will be found in G. Garrett, "Peace on the Rails," *Sat. Eve. Post*, CCXII, Sept. 9, 1939, pp. 8-9 ff. Cf. L. K. Garrison, "The National Railroad Adjustment Board," *Yale Law Jour.*, XLVI, 567-598 (Feb., 1937); W. H. Spencer, *The National Railroad Labor Adjustment Board* (Chicago, 1938).

its services in any such emergency.¹ If, after using its "good offices," the Board is unable to bring the parties to an agreement, it tries to persuade them to submit their contentions to an impartial board of arbitration, made up as occasion arises; and decisions of this body are binding upon the parties.

d. Emer-
gency
boards

Finally, if a controversy is not adjusted either by the Mediation Board or by arbitration, a strike vote of the employees may be taken. If a strike is voted (at least, such was the procedure until 1942), an emergency investigating board may be created by the president of the United States to investigate the facts pertaining to the dispute and report back to him. Although in no sense legally binding, an emergency board's findings and recommendations have usually received such wide public approval that the contending parties have accepted them. In this manner, several serious national calamities have been averted. Until 1942, emergency fact-finding boards were appointed separately for each dispute, and only after a strike had been voted; and the membership of such boards was left to the president's discretion.² In May of that year, however, an executive order set up an extraordinary National Railway Labor Panel of nine (later raised to twenty) members; and nowadays emergency boards of three members each are designated by the chairman of the panel whenever in his judgment a dispute, if not adjusted, might interfere with the prosecution of the war, "even in the absence of a strike vote." The recommendations of such emergency boards, in so far as affecting wage and salary payments, are required by executive order of February, 1943, to conform with the general stabilization program and policies of the director of the Office of Economic Stabilization.³

2. The
problem
of labor
gener-
ally:

But even before the present war, the federal government did not confine its efforts for industrial peace to the field of transportation.⁴ The same act of 1913 that set off labor as a separate executive department authorized the secretary either personally to act as a mediator in any and all labor disputes or to delegate the function to "commissioners of conciliation"; and out of this authorization grew a branch of the Depart-

¹ In fiscal 1943, the Mediation Board's services were invoked in 455 cases, and 425 were disposed of: 235 concerned changes in rates of pay, rules, or working conditions; and 190 were representation disputes. Four cases affected practically all employees of all principal railroads, and five involved commercial airlines and their employees. Five disputes calling for changes in wages and working conditions were referred to arbitration, with the parties agreeing to be bound by the awards of the boards of arbitration. *Ninth Annual Report of the National Mediation Board* (1943), 5-14.

² Except that no member might be pecuniarily or otherwise interested in any organization of employees or in any carrier.

³ During fiscal 1943, eleven separately designated emergency boards were appointed by the chairman of the National Railway Labor Panel, and eight of them submitted reports to the president with recommendations for the final settlement of the dispute. *Ninth Annual Report of the National Mediation Board* (1943), 35-39.

⁴ It may be mentioned that Congress in 1938 set up a Maritime Labor Board to mediate off-recurring and, sometimes peculiarly violent disputes between seamen and their employers. Experience, however, was less happy than in the railway field. The functions of the Board were later whittled down, and in 1942 the agency ceased to exist.

ment known as the United States Conciliation Service which has continued active and efficient to this day. During the past decade it has been especially successful in shifting emphasis from mediation as a *remedy* to the newer and growing concept of "*preventive conciliation*" as a positive instrument of industrial peace. Several large international and many local unions, as well as some progressive business managers, have shown a tendency to avail themselves of the good offices of the Service well in advance of any interruption of operations.¹

a. The
U. S.
Concilia-
tion
Service

Numerous provisions of the National Recovery Act were couched in such ambiguous language as to provoke controversies often culminating in strikes and other industrial disputes and interfering with the free operation of the law. A National Labor Board of eight (later thirteen) members was therefore set up by executive order in the summer of 1933, with power to establish nineteen regional boards to iron out differences arising between labor and capital in interpreting the law. Upon annulment of the act in 1935, however, this machinery passed out of the picture.

b. The
National
Labor
Board
(1933-35)

Although the activities of the Conciliation Service were sharply stepped up after the national defense effort was started in 1940, and with a very high percentage of settlements without work stoppage, its inability to prevent or end strikes in some of our most vital industries led President Roosevelt to set up, in March, 1941, an eleven-man National Defense Mediation Board,² "to assure that all work necessary for national defense" should "proceed without interruption and with all possible speed." The new agency had jurisdiction, however, over only disputes certified to it by the secretary of labor as being beyond the ability of the Conciliation Service to settle, and had no power to compel adherence to its decisions; and although it started off promisingly, by December, when actual war began, congressional and popular dissatisfaction with its failure to prevent recurring labor disorders led the President to convoke a conference of twelve industrial-management leaders and an equal number of representatives of organized labor at which it was agreed, on the one hand, that there should be a wartime moratorium on strikes and lockouts, with all disputes settled by peaceful means, and, on the other hand, that a new labor board for negotiating settlements should be set up.

3. Defense
and
wartime
develop-
ment

4.
De-
fense
Medi-
ation
Board
(1941-42)

Accordingly, in January, 1942, the Mediation Board was replaced with

¹ In fiscal 1943, more commissioners of conciliation were employed than at any previous time, and offices were established for twelve regional representatives to effect cooperation with the National War Labor Board. The Service was active in 17,559 "situations," in twenty-nine major industrial fields; and 12,315 of these disputes, involving more than six million workers, were settled. *Report of the Secretary of Labor* (1943), 10-13. See I. Ross, "Labor Mediators," *Harper's Mag.*, CLXXXII, 598-607 (May, 1941); J. Steelman, "Wartime Problems of the Federal Conciliation Service," *Annals of Amer. Acad. of Polit. and Social Sci.*, CCXIV, 135-140 (Nov., 1942), and "The Work of the United States Conciliation Service in Wartime Labor Disputes," *Law and Contemporary Problems*, IX, 462-470 (Summer, 1942).

² Consisting of three representatives of the public, four of employers, and four of employees.

b The
National
War
Labor
Board
(1942—)

a National War Labor Board¹ consisting of twelve members equally representing the public, industry, and labor, and endowed with authority to take jurisdiction of a dispute on its own initiative as soon as other procedures for adjustment have failed, and "finally" (i.e., without appeal to the courts) to determine the dispute, employing for the purpose mediation, voluntary arbitration, or arbitration under rules formulated by the Board. Under this set-up, what normally happens is: (1) the parties to a dispute resort to direct negotiations or to procedures provided in collective-bargaining agreements; (2) if this does not bring results, commissioners representing the Conciliation Service (if they have not already intervened) try their hand; (3) if this also fails, the secretary of labor certifies the dispute to the War Labor Board for settlement, although, after consulting that official, the Board, as indicated above, may take jurisdiction on its own motion. For the more expeditious handling of controversies, the Board, however, in January, 1943, announced a decentralized procedure, under which twelve-regional war labor boards were established and given full authority to make final decisions in all labor disputes arising in their respective jurisdictions—each regional board being a miniature of the parent Board, with members representing employers, employees, and the public. From decisions of the regional boards appeals may be taken to the National Board; and under this arrangement, the latter has become a sort of supreme court for labor disputes, although retaining and exercising original jurisdiction in cases of unusual importance and also in determining policies. Power to enforce the orders of national and regional boards alike rests with the president;² and on various occasions when such orders have been defied, he, acting as commander-in-chief of the armed forces, has instructed the Army or Navy to take over and operate plants until such time as compliance or settlement could be achieved.³ In October, 1942, the Board's jurisdiction was

¹ In point of fact, the Mediation Board had ceased to function effectively in November, after the C.I.O.'s representatives resigned in protest against the Board's refusal to grant the closed-shop demand of the mine workers' union in the "captive" coal mines owned by steel corporations.

The War Labor Board was created by executive order and rested on this basis until given statutory recognition in the War Labor Disputes Act of 1943, mentioned below. The order expressly provided that nothing therein should be construed as superseding or in conflict with the provisions of the Railway Labor Act, the National Labor Relations Act, the Fair Labor Standards Act, or the Public Contracts (Walsh-Healey) Act—the intention manifestly being that, even under stress of war, there should be no impairment of the gains realized by labor (and by the public) from this earlier remedial legislation.

² The Board is a unit within the Office for Emergency Management, in the Executive Office of the President.

³ During the first three years of its existence, the Board closed about 362,000 voluntary and contested cases, affecting thousands of employers and some twenty-four million employees. Compliance with the Board's decisions has been almost universal, government seizure of plants to prevent interference with the war effort being necessary in only twenty-five instances. The most widely publicized case of the kind is that of the Montgomery Ward Company in April, and again in December, 1944. "The magnitude of the Board's task has been unprecedented in the field of labor relations. . . . It has borne the double burden of wage stability and of settling labor disputes. . . . the most vigorous critics of the Board must pause in admiration for its

extended to "all industries and all employees," and to "voluntary as well as contested wage increases and decreases," making the agency easily the most important factor in the responsible work of stabilizing wage levels. During its first year, the Board was hampered by uncertainties about its relations to other agencies, and by the necessity of working out its own standards. Most of its decisions throughout, however, have been unanimous, and therefore presumptively sound.¹

Recurrence of strikes in violation of labor leaders' agreement to forego striking during wartime, and culminating in three general coal strikes during the spring and summer of 1943, spurred Congress to pass in June of that year—over strong protest from labor leaders and a forceful veto message from the president, but nevertheless by heavy majorities—the War Labor Disputes (Smith-Connally) Act, often called the "Anti-Strike" Act, since its declared purpose was to prevent strikes in wartime.² The measure empowers the president to take immediate possession of and to operate "any plant, mine, or facility equipped for the manufacture, production, or mining of any articles or materials which may be required for the war effort, or which may be useful in connection therewith," whenever he finds that "the war effort will be unduly impeded or delayed" by "a strike or other labor disturbance." Properties seized are to be returned to their owners within sixty days after the "restoration of production efficiency." But so long as the government remains in possession, interference with the operation of the property by "lockout, strike, slowdown, or other interruption" is unlawful, and aiding in such interruption—"by giving direction or guidance" thereto, or "providing funds for the conduct or direction thereof," or paying strike or other benefits to those participating therein—is prohibited.

c. The
War
Labor
Disputes
Act
(1943)

To plants operated privately, other provisions of the law apply. When any strike threatens seriously to interfere with war production, the National War Labor Board may intervene, with power to make its authority effective and to order changes in wages or working conditions when not in conflict with the government's economic stabilization policy. Notice of any dispute must be given to the secretary of labor, the

accomplishments." T. W. Kheel, executive director of the Board, quoted in *N. Y. Times*, Jan. 15, 1945. Cf. L. B. Boudin, "The Authority of the National War Labor Board Over Labor Disputes," *Mich. Law Rev.*, XLIII, 329-332 (Oct., 1944).

¹ On the work of the Board in general, see L. V. Howard and H. A. Bone, *Current American Government*, 244-252; and cf. E. W. Puttkammer [ed.], *War and the Law* (Chicago, 1944), 92-116; R. G. Poole, "The National War Labor Board," *Amer. Bar Assoc. Jour.*, XXVIII, 395-399, 466-470 (June, July, 1942); E. R. McConnell, "The Organization and Procedure of the National War Labor Board," *Law and Contemporary Problems*, IX, 567-573 (Summer, 1942); C. V. Shields, "The Authority of the War Labor Board," *1943 Wis. Law Rev.*, 378-401 (May, 1943).

² 57 *U. S. Stat. at Large*, 163. The text of the act appears in *N. Y. Times*, June 13, 1943; for the President's veto message, see newspapers of June 26. After pointing out defects in the Smith-Connally measure, the President recommended a general labor draft, as being more effective in preventing strikes. However, although approved by the War and Navy Departments and by large sections of the general public, the recommendation was received coolly in Congress and among labor leaders and did not prevail. See p. 639, note 1.

National War Labor Board, and the National Labor Relations Board; and if, during a "cooling-off" period of thirty days after such notice, a settlement is not reached, the last-named Board is required to take a secret ballot of employees concerned on the question "whether they wish to permit an interruption of war production," the result being made public by the Labor Relations Board.¹ From this it appears that war-time strikes in privately operated industries are legal under the "anti-strike" law if employees go through all of the motions required of them, and that the only strikes completely outlawed are those in plants that have been taken over by the government.²

Any one familiar with current events is well aware that, as a measure for preventing strikes, the Smith-Connally Act has been pretty much a failure—as, indeed, have all other attempts to prohibit strikes by law. Strikes have not been abolished; the country merely has illegal strikes instead of legal ones. Indeed, by compelling the government to sanction and sponsor strike votes even in the midst of war, the law has actually put an added weapon in the hands of industrial agitators.³

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¹ An enormous amount of work not germane to its main functions was thus thrown upon the Labor Relations Board. For a statement on this phase of the law by the Board itself, see *N. Y. Times*, Aug. 29, 1943; also the Board's *Eighth Annual Report* (1943), 74-81. According to a ruling by the attorney-general, an election must be held if requested by "the representatives of any group of employees" in a plant, even if only a minority. A strike vote of soft-coal miners in March, 1945, favored "interruption of war production," 208,000 to 25,000, though an actual strike was averted.

The railway unions, which operate under a statute permitting strike votes, have voluntarily relinquished the right to take such votes because they do not wish to strike in wartime. The anti-strike law, however, imposes on *all* industrial employees the obligation to take strike votes on request. In disputes between carriers and their employees, a congressional resolution approved June 30, 1944, requires that procedures of the Railway Labor Act (see p. 613 above) be followed; and that any award proposed be certified as consistent with the anti-inflation laws.

² Unless sooner repealed, the Labor Disputes Act will cease to be effective six months after termination of the war, or at an earlier date fixed by concurrent resolution of Congress; and no seizure of property because of a labor dispute is to take place after the cessation of hostilities.

The act further forbids any labor organization "to make a contribution in connection with any election" at which federal officers are to be chosen, and any candidate or political committee to accept such contributions (see p. 195 above). These provisions obviously have no relevancy to a measure designed to prevent strikes.

³ W. M. Leiserson, "Labor Relations in Wartime and After," *U. S. News*, Apr. 7, 1944, pp. 37-41; L. T. H., "The Smith-Connally Act and Its Effects," *Temple Univ. Law Jour.* XVIII, 275-281 (Apr., 1944).

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CHAPTER XXXII

SOCIAL SECURITY

Back-ground
of a new
national
policy

Outside of limited groups of people who interested themselves in European systems of unemployment insurance, old-age pensions, and sickness and accident benefits, Americans commonly showed no great concern about such instruments of social security until the economic depression of the thirties threw nine or ten million people out of work and forced the federal government to spend multiplied billions in relieving distress, making work, "priming the pump" of private industry, and in other ways endeavoring to get a baffled and discouraged nation back on its feet. Quite apart from the human misery and economic loss entailed by the experience, the government, it was considered, could not go on making such outlays indefinitely. To be sure, a limited business recovery, preceptible in 1934, tended somewhat to relieve the pressure. But careful studies, prompted by the crisis, of the country's situation and prospects pointed to such disturbing facts (fully revealed in reports made public in 1937-38) as that while population was growing by eighteen per cent between 1920 and 1936, industrial jobs were declining by twenty-five per cent, and that, with life expectancy rising and the birth-rate declining, persons over sixty-five years of age would in the future constitute a greatly increased proportion of the country's population—one in every eight, it was predicted, by 1980. Unemployment, on a considerable scale, it appeared, would be permanent; the burden of caring for the needy aged would steadily grow heavier; and the conclusion was inevitable that the problem before the nation was far more than merely one of tiding the people over the existing depression.¹

The
Social
Security
Act
(1935):

Some forward-looking measures, mainly in the nature of old-age insurance plans, were undertaken by a goodly number of the states. But there was the vital matter of unemployment insurance, on which only Wisconsin had acted, besides plenty of other urgent needs. As was to be expected, fantastic schemes were advanced from various quarters, e.g., the "Townsend plan," calling for payment of two hundred dollars

¹ The investigations referred to were conducted chiefly by the President's Committee on Economic Security, the National Resources Committee (forerunner of the later National Resources Planning Board), and the Brookings Institution. See especially a publication of the Committee on Economic Security entitled *Social Security in America* (Washington, 1937), and one of the National Resources Committee entitled *The Problems of a Changing Population* (Washington, 1938). Cf. W. S. Thompson and P. K. Whelpton, "The Population of the Nation," in *Recent Social Trends in the United States* (New York, 1933), Chap. I; W. F. Ogburn, "How Many Old People in the Future," *State Government*, XII, 157-158 ff. (Sept., 1939); and R. Hilton, "Old People; A Rising National Problem," *Harper's Mag.*, CLXXIX, 449-459 (Oct., 1939).

a month to all persons over sixty on condition only that they stop work and spend their pensions as fast as received; and the "Lundeen plan," calling for weekly payments of not less than ten dollars to all unemployed persons eighteen years of age and over.¹ From the Administration—convinced that while the states should bear a share, the national government should assume the main responsibility—came also a plan, ambitious to be sure and by no means beyond criticism, yet on the whole well conceived and certainly moderate as compared with the others mentioned; and in the omnibus Social Security Act of 1935, characterized by President Roosevelt as "the most useful and fundamental single piece of federal legislation ever enacted in the interest of American wage-earners," this plan, in its essentials, was duly translated, by overwhelming majorities, into national law.² To a considerable extent, the measure was based on social insurance systems prevailing in the more advanced countries of western Europe.

Space forbids a detailed analysis of the federal-state social security structure now erected, but certain major features must be noted. Towering above all other aspects of the legislation are the provisions made for unemployment compensation and for protection of the aged. With a view to safeguarding the great mass of wage-earners against the hazards of unemployment, the states are encouraged, by federal grants designed to assist in meeting administrative expenses, to set up insurance or compensation systems. Under these, workers involuntarily unemployed receive benefits paid through public employment offices or other approved agencies and derived from a tax on employers of eight or more persons at a rate rising from one per cent of the annual payroll in 1936 to three per cent in 1938 and thereafter.³ Speaking strictly, there is no federal system of unemployment compensation; Congress has merely utilized its taxing and appropriating powers to stimulate the states to devise and set up compensation systems of their own; and while various prescribed conditions must be met if federal assistance is to be forthcoming, each state is left free to adopt any general type or plan of compensation preferred, and, in so doing, to determine the classes of unemployed and the conditions under which such classes may participate, as well as the scale of benefits. Nowhere has it been found feasible to make an unemployment compensation scheme cover all of the gainfully employed, and the system here described does not extend to agricultural workers, domestic servants,

1 Unemployment compensation

¹ M. S. Stewart, "Pensions After Sixty," *Public Affairs Pamphlets*, No. 46 (New York, 1940); N. Roosevelt, *The Townsend Plan* (New York, 1939); S. Downey, *Pensions or Penury* (New York, 1939).

² 49 *U. S. Stat. at Large*, 620.

³ The collection of this tax by the federal government began January 1, 1936. Against their payroll tax, employers are given a credit up to ninety per cent for payments made in compliance with their state compensation law. The remaining ten per cent is the only federal contribution, and this is intended merely to cover the expense of administering the state systems. The fiscal year 1939-40 was the first in which unemployment benefits were payable under the laws of all forty-eight states, Alaska, Hawaii, and the District of Columbia.

public employees, casual laborers, employees of religious, charitable, educational, scientific, and literary institutions or organizations, to officers and crews of vessels, or to employees of common carriers in interstate commerce.¹

2. Old-age assistance and insurance

The problem of the aged presents itself in two different although related aspects—that of relieving aged persons who already are dependent and that of preventing dependency later on. As being the more immediately pressing, the first of these matters was taken up by the states (beginning with Montana in 1923) a good while before the Social Security Act was passed; by the close of 1934, twenty-nine states, indeed, had enacted legislation on the subject, although in most cases the sums made available for benefits were small. To stimulate and nationalize old-age assistance, the Social Security Act introduced a policy of federal responsibility and coöperation under which federal aid is extended to the states on a basis of fifty per cent of the total outlays made for the purpose, although in no case are such outlays to involve a federal allowance of more than fifteen (changed in 1939 to twenty) dollars a month per person. Within three years, every state of the Union qualified to receive the federal funds.²

More ambitious are the provisions made for old-age insurance. Applying to substantially the same workers who are reached by unemployment compensation (the principal groups excluded are indicated above), the act of 1935 set up a nation-wide retirement system under which pensions,

¹ A Railroad Unemployment Insurance Act of 1938 first provided a uniform system of unemployment insurance for railway workers in interstate commerce, previously covered only by the varying provisions of state insurance laws. 52 *U. S. Stat. at Large*, 1094; 53 *ibid.*, 845; 54 *ibid.*, 1094.

On July 1, 1943, some forty million workers were covered by unemployment insurance under the legislation of 1935, and over two billion dollars had been paid to unemployed workers. The peak month was June, 1940, when more than 1,200,000 wage-earners drew unemployment benefits totaling over \$53,600,000. With defense and wartime employment rising, payments declined sharply after 1940; in June, 1943, a weekly average of only 100,256 workers received benefits, and payments totaled less than six million dollars. P. V. McNutt, quoted in *N. Y. Times*, Aug. 14, 1943. Cf. Social Security Board, *Eighth Annual Report* (1943), 52-59. In most states, the maximum benefit payment is fifteen dollars a week, for a limit of fourteen to sixteen weeks.

On the system in general, see W. Haber and J. J. Joseph, "An Appraisal of the Federal-State System of Unemployment Compensation," *Soc. Service Rev.*, XV, 207-241 (June, 1941); R. C. Atkinson, *The Federal Role in Unemployment Compensation Administration* (Washington, 1941). The defects of the present federal-state plan and the advantages that a unified national system would have are set forth in the Social Security Board's *Eighth Annual Report* (1943), 34-40. Cf. G. F. Rohrich, "Consolidation of Unemployment Insurance and the Problem of Centralization," *Pub. Admin. Rev.*, IV, 43-50 (Winter, 1944). President Roosevelt favored going over to a unified national system, but a majority of the states have been opposed.

² On July 1, 1943, more than two million old people were getting cash payments through state public assistance programs under the new legislation; and of the approximately \$616,600,000 spent for the purpose during the preceding fiscal year, about half, of course, represented federal funds. Within limits and standards fixed nationally, each state makes its own detailed arrangements; but in all cases assistance is given only after the age of sixty-five, and only to persons who neither can support themselves by work or savings nor rely on being supported by children or other relatives. Naturally, the beneficiaries themselves contribute nothing to the funds used in maintaining the system.

graduated in amount on the basis of earnings and length of service, are payable at the age of sixty-five¹ from a fund built up from contributions made equally by employers and employees;² the national government making no direct contribution, but playing the rôles rather of collector, bookkeeper, and administrator. In essence, the plan is one for compulsory savings—in other words, for spreading wages over the lifetime of the worker rather than over merely his wage-earning years; and on the theory that the employer is both concerned and obligated, he is required to help make the plan workable by sharing in creating and maintaining the fund. Contributions made by employers and employees alike started at one per cent of the wages received in 1937, and under the original law would have reached a maximum of three per cent in 1949. Because, however, this promised to build up huge reserves long before they would be needed, Congress later “froze” the tax at one per cent for the calendar years 1940-44, and in 1944 froze it again at the same figure for 1945, leaving open the question of whether the intended maximum would ever actually become effective. The amount received by a beneficiary depends to a degree upon the sum that he has paid in, but may in no case exceed eighty-five dollars a month.

In 1939, the name of this phase of social security was changed to “old-age and survivors’ insurance,” and the scope was broadened to include protection of the family, rather than merely the wage-earner, through the establishment of monthly benefits for certain dependents and survivors of retired workers, and for certain survivors of insured workers who die before retirement. The date for the first payment of monthly benefits was advanced from January 1, 1942, to January 1, 1940; and a few minor groups previously excluded were brought under the terms of the law.³

Amend-
ments of
1939

Additional aspects of the national social security program adopted in 1935 can merely be mentioned. (1) Federal aid is provided for the care of dependent children under sixteen years of age (eighteen, if they remain in school), for maternal and child health work on lines not very

3. Other
forms of
security
and
ameliora-
tion

¹ Provided the worker has been employed under the system over a period of five years and has received total wages of at least \$2,000. In the period 1937-43, the total payments made under the old-age and survivors’ insurance program amounted to \$359,000,000, and by July 1, 1943, more than sixty million workers in industry and commerce were insured. Workers who drew benefits in 1942-43 represented only about one in forty of all eligible workers, compared with about one in ten in the preceding fiscal year. The difference is explained largely by the fact that, under wartime conditions, many workers sixty-five years of age or over had chosen to continue at work.

² These “contributions” take the legal form of an excise tax levied by Congress upon employers’ payrolls and an income tax upon employees. Both are collected from the employer, who is personally liable for them. Herein we find the only part of the new social insurance system which is administered by the national government exclusively.

³ 53 U. S. Stat. at Large, 1360. See *Fifth Annual Report of the Social Security Board* (1940), 24-54. The amendments were largely the result of a report of an Advisory Council on Social Security, December 10, 1938 (76th Cong., 1st Sess., Sen. Doc. No. 4). Cf. D. Waldron, “Social Security Amendments of 1939,” *Univ. of Chicago Law Rev.*, VII, 83-111 (Dec., 1939).

different from those laid down by the Sheppard-Towner Act of 1921,¹ for child-welfare activities, and for services to crippled children. (2) Following up provisions of the Vocational Rehabilitation Act of 1920, federal aid, in increased amounts, is extended to vocational rehabilitation, which is now placed upon a permanent basis. (3) On lines similar to those followed in relation to old-age assistance, federal aid is provided to enable the states to pay pensions to the blind. (4) While no federal program of general health insurance has as yet been adopted, the legislation of 1935 extends aid to the states for strengthening and improving state and local public health services.

Before federal money for any of these purposes becomes available, a state's plans for the use of the joint funds must receive the approval of some designated agency of the national government. To the states, therefore, it falls to take the initiative in getting the various arrangements under way. To them also it falls to determine who are entitled to receive benefits or assistance, as well as the amounts to be allowed. In some fields, the federal grant equals the state appropriation; in others, it is one-third; in still others, it is based upon population or financial need, or both.²

The system sustained by the Supreme Court

During the two years following the national legislation of 1935, a majority of the states took (with respect to several of the programs, or all of them) whatever action was necessary to qualify for the various forms of aid and coöperation contemplated; and a federal Social Security Board—originally an independent establishment,³ but now a unit within the Federal Security Agency—entered upon its huge task of supervising a system estimated to entail in future an outlay of not less than three billion dollars a year. Inevitably, the legislation was attacked at many points on constitutional grounds, and amidst confusing decisions of lower courts a good deal of doubt arose as to how much of it would ultimately be sustained. In a series of notable decisions handed down on May 24, 1937, however, the federal Supreme Court, taking a far broader and more liberal view than in earlier decisions such as those involving the N.R.A. and the first A.A.A., upheld every really vital feature of the basic act,⁴ discovering at last, as some one has remarked, "a method for implementing nationalism."

¹ See p. 99 above.

² The Social Security Act amendments of 1939 considerably increased appropriations for the welfare purposes mentioned above. For aid to 747,000 dependent children, expenditures in fiscal 1943 amounted to \$150,000,000, and blind persons received \$24,900,000. The federal share of these totals was about forty and thirty per cent, respectively. *Eighth Annual Report of the Social Security Board* (1943), 60-70. Cf. J. M. Patterson, "Public Welfare Administration Under Federal Grants-in-Aid," *State Government*, XVII, 352-354 (June, 1944).

³ Consisting of three members appointed by the president and Senate for six-year terms.

⁴ *Carmichael et al. v. Southern Coal and Coke Co.*, 301 U. S. 495; *Charles C. Steward Machine Co. v. Davis*, 301 U. S. 548; *Helvering et al. v. Davis*, 301 U. S. 619. For general discussions, see I. G. Carter [ed.], "Appraising the Social Security Program," *Annals of Amer. Acad. of Polit. and Soc. Sci.*, CCII, 1-197 (Mar., 1939).

Before the United-States had long been in the present war, it became apparent that the aids and services provided by the legislation of 1935 and 1939 would need to be considerably broadened in order to meet the situation created by the return of millions of service men and women to civilian life; and realization of this led in 1944 to the enactment of a more or less specialized social security measure entitled the Servicemen's Readjustment Act, popularly known as the "GI Bill of Rights."¹ For honorably discharged veterans of the present war, the law provides unemployment compensation up to fifty-two weeks of unemployment, federal guarantee of loans up to \$2,000 for the purchase or construction of homes or the purchase of farms or business property, loans or even subsidies for purposes of education or professional training, hospitalization and medical care, and other kinds of benefits.² Leaders of thought on the general subject have long insisted, however, that postwar expansion of the social security program ought to go a great deal farther than this. Considering that the prewar system constituted only a good beginning, President Roosevelt, as early as January, 1943, urged upon Congress an increase in the coverage of old-age and survivors' insurance, the addition of temporary and permanent disability payments, hospitalization payments beyond the existing benefit program, and "liberal expansion of unemployment compensation in a uniform national system."³ A year later, the National Resources Planning Board, in a 640-page report, reviewed the experience and achievements of preceding years, pointed out inadequacies in the existing arrangements, and suggested ways in which the entire program could be expanded, improved, and geared to postwar national needs.⁴ In its annual reports of January, 1944 and 1945, the Social Security Board mapped out and strongly urged broad extensions of the existing system, in the later instance advocating especially (1) the extension of unemployment insurance to from fifteen to twenty million workers not yet covered and (2) the plugging of the largest gap in the

¹ *Public Law 346*, 78th Cong., 2nd Sess. (1944).

² A War Mobilization and Reconversion Act, approved October 3, 1944 (*Public Law 468*, 78th Cong., 2nd Sess.), provided, among other things, for a unified re-employment program covering recruitment, training, transfer, and placement of returning service men and workers engaged in war production, through a Retraining and Reemployment Administration. Cf. J. G. Patton, "The Federal Government's Role in the Postwar Economy," *Amer. Polit. Sci. Rev.*, XXXVIII, 1124-1136 (Dec., 1944).

³ Budget message, *N. Y. Times*, Jan. 8, 1942.

⁴ *National Resources Development Report for 1943* (Washington, 1943), Part III, "Security, Work, and Relief Policies." Based upon a three-year study, this important document was transmitted to Congress by the President in a letter of March 10, 1943, strongly urging action on the lines recommended. In addition to broadening and extending existing security measures, the Board advocated protection of all youth under twenty-one, more adequate medical care, the expansion of state and local child-welfare services (with federal assistance), free school lunches for all school children, and the unification of all phases of the security program in a single, completely integrated, national system. The Board's findings and recommendations will be found summarized in *N. Y. Times*, Mar. 11, 12, 1943. See also E. M. Burns, "NRPB Proposes Social Security," *Nat. Mun. Rev.*, XXXII, 232-236 (May, 1943); R. F. Wagner, "Social Security Lifts Its Sights," *Survey Graphic*, XXXII, 283 ff. (July, 1943); Anon., "Post-War Security for All?," *U. S. News*, Sept. 3, 1943, pp. 41-45.

existing system by the introduction of a nation-wide plan of disability and sickness insurance. And early in 1945 the Roosevelt Administration was understood to be planning to launch a determined drive in behalf of a comprehensive scheme on these lines.¹

The
outlook

For the time being, the atmosphere is not particularly favorable for so drastic an extension of existing social security arrangements. The burden of war taxes disinclines the people to new outlays; on various grounds, insurance companies, medical associations, school authorities, and other interests are lukewarm or opposed; a reaction against "New Dealism," which, in 1943, did not stop at liquidating the National Resources Planning Board itself, creates further obstacles. Whatever the immediate outcome of efforts now being made, however, or of other particular proposals or plans, a program of social well-being has been launched in the past dozen years which is not likely in times ahead to be left in its present illogically incomplete condition. A deep tide is running which, in this country as in Great Britain and elsewhere,² will almost certainly be carried to new heights by postwar conditions and problems, and which in the meantime will hardly be more than momentarily stayed.

Low-Cost Housing and Slum Clearance

Under
the Re-
covery
Act
(1933)

In the "slum" areas of our large cities, hundreds of thousands of low-income wage-earners are obliged to live in old, dilapidated, insanitary, and over-crowded tenements; and social workers long ago called attention to the menace of such conditions to both individual and public health, morals, and safety. Not until 1933, however, did the national government take any action on the matter. In the Recovery Act of that year, Congress authorized the Public Works Administration to undertake "the construction...under public regulation or control, of low-cost housing and slum-clearance projects"; and within the ensuing five years some fifty large-scale projects in thirty-six states—all under the direct management of the housing division of the Public Works Administration—were undertaken and completed.

Under
the
United
States
Housing
Act
(1937)

These enterprises were entered upon primarily as emergency measures to reduce unemployment, and with only secondary emphasis upon the social values of low-cost housing and slum clearance. However, the temporary program has now been superseded by a more permanent one

¹ A bill based in part on the Planning Board's recommendations, and aimed at "covering the major economic hazards from the cradle to the grave," has been pending in Congress since 1943 (the Wagner-Murray-Dingell Bill). Among other changes, the measure proposes to replace the present federal-state system of unemployment insurance with a completely unified national system; and it provides generously for disability and sickness insurance. A referendum vote taken by the Chamber of Commerce of the United States in September, 1944, strongly favored expansion of the social security system along lines similar to those contemplated in this bill. *N. Y. Times*, Oct. 2, 1944.

² The 1943 report of the National Resources Planning Board found a significant counterpart in Britain in Sir William Beveridge's *Social Insurance and Allied Services* (American edition, New York, 1942), representing the results of study by a royal commission, and commonly referred to as the "Beveridge Report."

developed in the United States Housing (Wagner-Steagall) Act of 1937,¹ and greatly expanded under plans matured early in 1945 by government officials in consultation with housing experts, city planners, and building industries, and expected to be implemented soon by amendments to the statute mentioned. Under the 1937 law, the government no longer engages directly in housing construction and slum clearance; instead, it throws responsibility for providing better homes for low-income groups upon state and municipal authorities, acting through specially created "public housing authorities." A United States Housing Authority in the Department of the Interior was given a capital stock of \$1,000,000 and empowered to raise \$500,000,000 by sale of its obligations, fully guaranteed by the federal government; and from these funds loans were to be (and since that time have been) made to state and local housing authorities, which in turn attend to the actual work of slum elimination and replacement with improved low-cost housing. Up to ninety per cent of the money spent by a housing authority may be loaned by the federal government (at low interest rates), the remainder being furnished locally; and all states except ten have provided for the requisite housing authorities as a necessary condition of receiving the federal aid.

A new phase of the housing problem appeared with the rapid expansion of shipyards and of plants for manufacturing airplanes, powder, and other war materials, the building of new plants for such purposes, and the construction of military camps and training quarters. Hundreds of thousands of workers and their families flocked to localities not equipped to house them. In providing suitable accommodations, the major rôle was for a time naturally played by the United States Housing Authority, in coöperation with the War and Navy Departments, the Authority being empowered in 1940, either itself or through assistance to local authorities, to construct public-housing facilities for persons engaged in defense work in localities where an acute housing shortage should be found to be impeding the expansion of vital industries. In February, 1942, when no fewer than sixteen more or less overlapping and conflicting federal agencies were found to be engaged in housing activities, an executive order consolidated all of them into a single National Housing Agency, headed by an administrator; and of three divisions in which the new agency was organized, one—a Federal Public Housing Authority—took full responsibility for housing constructed with public funds (thus succeeding the United States Housing Authority), and the other two—the Federal Housing Administration and the Federal Home Loan Bank Administration—divided between them the work of encouraging and financing private home construction and ownership.²

Defense
housing
and the
Federal
Housing
Agency

¹ 50 U. S. Stat. at Large, 888.

² During the defense effort and war, the government's concern was naturally with defense housing almost exclusively, and between 1940 and the end of January, 1944, a total of 1,479,502 war-housing units were constructed or reconstructed—about half of them publicly, and about half privately, financed. See R. G. Weintraub and R.

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- Tough, "Housing War America," *Soc. Service Rev.*, XVII, 38-49 (Mar., 1943). At the close of the war, approximately half a million of these structures (designed for only temporary use) are to be demolished, with a view to avoiding later "ghost towns" where war industries have disappeared. Peacetime housing activities, however, are expected to be resumed on a vast scale, the more by reason of provisions in the "GI Bill of Rights" opening opportunities for home ownership to fifteen million service men and women. On the general subject, see M. H. Schoenfeld, "Progress of Public Housing in the United States," *Monthly Labor Rev.*, LI, 267-282 (Aug., 1940); M. L. Colean, "Can America Build Houses?," *Public Affairs Pamphlets*, No. 19, revised (New York, 1940); E. E. Wood and E. Ogg, "The Homes the Public Builds," *ibid.*, No. 41 (New York, 1940); W. Ebenstein, *The Law of Public Housing* (Madison, Wis., 1940); Twentieth Century Fund, *American Housing—Problems and Prospects* (New York, 1944); and for studies of one of the country's most successful housing agencies, M. N. McGeary, *The Pittsburgh Housing Authority* (Pa. State College, 1943), and Pittsburgh Housing Association [Symposium], *Citizens Look at Housing* (Pittsburgh, 1944).

CHAPTER XXXIII

FOREIGN RELATIONS

One thing that the framers of the constitution in 1787 could take for granted was that the new national government which they were planning would have exclusive control over the country's dealings with governments abroad. Even under the Articles of Confederation, the states had no authority to send or receive ministers and consuls, or to make war, or peace, or treaties, or alliances; and we have the word of the federal Supreme Court that even if the powers necessary for doing these things had received no mention in the new fundamental law, they would have belonged to the national government in any case, as being "necessary concomitants of nationality."¹ To be sure, the constitution's authors made specific assignments of various powers and functions in this area. They authorized the president to appoint "ambassadors, other public ministers and consuls," to make treaties, and to receive "ambassadors and other public ministers"; they gave the Senate a check upon this authority by making its advice and consent necessary to appointments and treaties; they conferred the regulation of foreign commerce upon Congress, and likewise the power to declare war; by assuming the existence of heads of departments, they inferentially provided for something in the nature of a department of foreign affairs; and they forbade the states to "enter into any treaty, alliance, or confederation"—or indeed into any "agreement or compact...with a foreign power" except with the consent of Congress. Presumably, however, most or all of the powers in this field conferred upon the national government could have been exercised even if no grants had been made; for (reverting to the Supreme Court's interpretation) the general principle that the national government has only powers granted in the constitution or implied therein holds "categorically true" only with respect to domestic affairs, while in the area of foreign or external affairs—although the president and Congress must, of course, comply with any mandates which the constitution lays down—actions not prohibited may be taken without any constitutional authorization at all, express or implied.

Constitutional basis

If control over foreign relations is not divided between nation and states, within the national government it nevertheless is distributed

¹ *United States v. Curtiss-Wright Export Corporation*, 299 U. S. 304 (1936). This case turned on the validity of the President's asserted right to prohibit the sale of arms to two warring Latin-American nations, Bolivia and Paraguay, in pursuance of a joint resolution of Congress (1934) conferring such power (48 U. S. Stat. at Large, 811). Cf. C. P. Patterson, "In re" *The United States v. the Curtiss-Wright Corporation*, *Tex. Law Rev.*, XXII, 286-308, 445-470 (Apr., June, 1944).

Control
shared by
president,
Senate,
and
Congress

among different authorities; indeed, the United States has gone farther in dividing the responsibilities involved than has any other country anywhere. By nature, to be sure, the management of a nation's official dealings with other nations is an executive function; and in even the most advanced democracies elsewhere, the executive (in Great Britain, for example, the cabinet, working through the Foreign Office) performs it with comparatively little check or restraint from legislature or courts. In the United States, too, the supreme director of our official international intercourse is the president. Nowhere in the constitution, however, is the chief executive expressly given such supremacy; on the contrary, he is merely assigned certain powers, the Senate is assigned other powers, and Congress as a whole is assigned still others. If (as is true) primacy in this field rests with the president, it is only (1) because the powers given him—appointment, direction, negotiation, etc.—are the most basic, and (2) because, as John Jay long ago pointed out, his office enjoys, as compared with Congress, the lofty advantages of unity, continuity, means of secrecy and dispatch, and unique sources of information.¹ In the immediate *conduct and management* of the country's foreign relations, the president has, to all intents and purposes, a free hand; in determining the *policies* to be pursued, he shares power heavily both with the Senate alone and with Congress. As illustrated by the bitter controversies over the Versailles Treaty and the League of Nations, by deadlocks over such matters as the proposed St. Lawrence waterway, and by current deep concern over the rôle to be played by the United States in the international settlement to follow the present war, this almost unique division of control in the domain of foreign relations—though perhaps ultimately defensible, and certainly in the spirit of American polity—leads, on plenty of occasions, to unpredictability, delay, confusion, and futility at a point where national unity and decision are particularly to be desired.

With these general facts in mind, we may turn to the ways in which our foreign relations are conducted, starting with the president as supreme director; although, the president's functions being exercised largely through the Department of State and its far-flung auxiliary, the Foreign Service, something may well be said about these agencies before the chief executive is brought directly into the picture.

The Department of State

Home
and
foreign
functions

The first executive department established after the constitution went into effect was a department of foreign affairs, continuing a department of that nature originally created by the Continental Congress in 1781. It soon seemed desirable, however, to assign to this department certain duties which had no relation to foreign affairs, and hence in less than two months the department was reorganized as the Department of State; and this broader scope and title it has ever since retained. The Depart-

¹ *The Federalist*, No. Lxiv (Lodge's ed., 400-406).

ment's main function is, and always has been, to carry on, under the president's direction, the official transactions of the United States with foreign governments. Nevertheless, its head, the secretary of state (directly or through subordinates), receives the laws of Congress, promulgates them, and files the original copies for preservation; keeps the great seal of the United States and affixes it to executive proclamations, to various commissions, and to warrants for the extradition of fugitives from justice; proclaims the admission of new states; transmits to the states constitutional amendments proposed by Congress, receives from the governors official notice of the action taken, and proclaims amendments which have been duly ratified; calls on the governors of the states, after a presidential election, for authentic lists of the electors chosen, and transmits the information to Congress; and renders various other services as required by law. In other words, notwithstanding the transfer of sundry functions of this general nature to other departments from time to time, the State Department remains to a considerable extent a "home office," charged with keeping archives and proclaiming public acts, and with serving as a medium of communication between the president and Congress on the one hand and the authorities of the states on the other. Most of this work, it may be added, while important, is of a purely routine character.

The great bulk of the Department's activities have to do rather with our government's dealings abroad; and it is in these that we are interested here. Subject always to presidential direction and control, the secretary of state and his subordinates negotiate treaties and trade agreements, carry on correspondence with foreign states, give instructions to our ambassadors, ministers, and consuls abroad, attend to all matters of extradition, issue passports, make arrangements for international conferences and congresses, gather information about conditions in foreign lands and place it at the disposal of the president, of Congress, or, if suitable, of the public, and, in general, stand ready to take up any task, in peace or war, which the protection or promotion of American interests beyond our borders entails.¹ Foreign governments and their representatives normally communicate with our government, and in turn receive its communications, only through the Department of State; although the

¹ It is to be noted, however, that several of the other nine departments touch foreign relations at important points, *e.g.*, Justice in relation to immigration, and the War and Navy Departments through their military, naval, and air attachés on the staffs of embassies and legations, not to mention the many special connections arising under conditions like those created by our participation in World War II. In 1943, indeed, more than thirty different departments and agencies had representatives abroad. For full comment on this matter, see W. H. C. Laves and F. O. Wilcox, "Organizing the Government for Participation in World Affairs," *Amer. Polit. Sci. Rev.*, XXXVIII, 913-930 (Oct., 1944), where it is shown not only that the effect of wartime experience has been greatly to disperse the operating activities involved in managing our foreign relations, but that after the war there will be weighty questions as to how much concentration can again be attained or should be attempted—outside, at any rate, of policy-making, which it is generally agreed must remain a State Department function, under responsibility to the president.

president, on his part, may, and occasionally does, communicate with them through conversations at the White House, through personal agents sent abroad, by transoceanic telephone, and in these later days through personal conferences held at distant points of the earth.¹

Organi-
zation
of the
Depart-
ment:

Although normally among the smaller departments in personnel, the Department of State, including the auxiliary Foreign Service is, in the geographical sweep of its activities, the most extensive of all,² being, indeed, the long arm by which the government reaches out to and deals with matters in the remotest lands beyond the seas. The Department itself, in the narrower sense, is situated wholly in the national capital, where in peacetime it had a force of some 1,100 officers and employees, now swollen to more than 2,600; the Foreign Service, with upwards of 5,000 officers and employees, operates in foreign lands, under separate regulations as to recruitment, salaries, and similar matters. No one would need to be told that the explosive international situation during the later thirties—followed by the strains and stresses of the greatest war in our history—imposed upon the Department the heaviest responsibilities and labors that it had ever known. And one would be prepared to hear that its pattern of organization was more or less altered to meet the emergency. Most people, however, would hardly have expected, in such a time, the general overhauling of departmental organization and functions which actually took place, in two main stages, in 1944. In point of fact, the Department had long been under criticism for lacking a basic scheme of sound administrative organization, for being too much out of touch with congressional and public opinion, and for having neither organization nor personnel adapted to furnishing the leadership in its field which the country had a right to expect. The war brought upon it a multitude of new tasks; and the postwar period held no promise of anything but growing burdens and responsibilities. The upshot was that, in January, 1944, a carefully planned general reorganization was carried out; and, although probably the most extensive in the Department's history, it, in turn, was followed, in December of the same year, by another of at least equal scope and significance. The bird's-eye view of the departmental set-up which will have to serve our purposes here naturally reflects the resulting arrangements—arrangements which, in their broader outlines, will probably stand for some time; although the inclusion of a division of management planning in the new pattern reflects the very wholesome point of view that organization ought to be kept sufficiently flexible to permit of further changes whenever need for them appears.³

¹ See p. 640, note 1, below.

² Except, of course, when the War and Navy Departments are functioning in a global war.

³ The full text of the departmental "reorganization order" of Jan. 15, 1944, will be found in the *Department of State Bulletin* of that date, and that of the order of the following December 20, in *ibid.*, Dec. 17, 1944, Supp. The earlier reorganization is described in detail in W. H. C. Laves and F. O. Wilcox, "The Reorganization of the Department of State," *Amer. Polit. Sci. Rev.*, XXXVIII, 289-301 (Apr., 1944).

The head of the department (including the Foreign Service) is, of course, the secretary of state—usually the most conspicuous cabinet officer, and in any event endowed with a certain primacy by statutory recognition as next after the vice-president in line of succession to the presidency. His is the oldest department, with functions of a more delicate nature than those of any other. Except on rare occasions when the president chooses to take foreign relations pretty much into his own hands (as did President Wilson during the first World War), the secretary of state is likely to sustain more intimate relations with his chief than does any other department head; and he alone among the ten makes no annual report that goes to Congress and to the public. Not all secretaries of state have been great men or able administrators; comparatively few have, like Jefferson and Hay, brought to their office previous experience in diplomacy. The roster of incumbents since 1789 has, however, been adorned with enough honored names—Jefferson, Marshall, Madison, John Quincy Adams, Clay, Webster, Seward, Blaine, Olney, Hay, Root, Hughes, Stimson, and Hull—to have invested the secretaryship, like the presidency itself, with a lofty tradition.

1. The
secretary
of state

Next in rank to the department head is an under-secretary of state, who, when his chief is absent or incapacitated, becomes acting secretary and at other times aids in the formulation and execution of policy. Then come six assistant secretaries of state, each in charge of a coördinated area of departmental activity. One of these areas is economic affairs—now better linked up and consolidated than ever before. Two are of a geographical nature, one embracing European, African, Near Eastern, and Far Eastern affairs, and the other “American Republic” affairs. A fourth area is that of public and cultural relations, with considerably more importance attached to this function than previously. A fifth area similarly envisages greater stress on the Department’s relations with Congress. And a sixth sweeps together a multitude of activities under the general caption of “administration,” *i.e.*, departmental housekeeping. Coördinate with the assistant secretaries in rank and actual importance are the Department’s legal adviser and a special assistant to the secretary of state. Study of an organizational diagram ¹ will give a fair idea, not only of the multiplicity and diversity of the “offices,” “divisions,” and other units assembled under the various top officials, but of the number (not large) charged with special wartime functions and therefore likely to be discontinued or curtailed in days to come. Not to be overlooked, too,

2. The
adminis-
trative
structure

and the later one in the same authors’ “The State Department Continues Its Reorganization,” *ibid.*, XXXIX, 309-317 (Apr., 1945). The first reorganization took place under Secretary Hull and had been almost completely carried into effect when, in November, 1944, Secretary Stettinius took office and forthwith began planning another reorganization aimed at expanding and developing the first one. The second reorganization was accompanied by a general shift of personnel in the higher offices. Senatorial opposition to several of the nominees eventually melted away, and all were confirmed by substantial majorities.

¹ Such as may be found in *Department of State Bulletin*, XI, 794-795 (Dec. 17, 1944, Supp.).

are the departmental committees serving as top agencies for policy formation—(1) the Secretary's Staff Committee, consisting of the under-secretary, assistant secretaries, and other officials of equivalent rank, and (2) the Coördinating Committee, consisting mainly of the "office" directors working at a lower level in the departmental hierarchy, and concerned with inter-office relations and with reviewing from time to time questions of policy before reference of them to the Staff Committee.¹

Organi-
zation

The Foreign Service

The first thing that one discovers on turning to the Foreign Service is that what is now a single establishment was formerly two, *i.e.*, diplomatic and consular. Each had not only its own functions but its own personnel, its own system of recruiting and promotion, its own classification, and its own salary scale; and, however much aptitude a member of one service might show for work of the kind performed by the other, it was almost impossible for him to be transferred. For many years the feeling grew that the wall separating the two services ought to be broken down, and after numerous proposals had fallen by the wayside, the Rogers Act of 1924 accomplished the desired reform.² Diplomatic and consular services were consolidated in a single field force known as the "Foreign Service of the United States"; the diplomatic and consular branches of this service were put on an interchangeable basis, so that transfers might be made from one to the other whenever found advantageous; and provision was made for assignment of new recruits to either branch of the service in which they happened at the time to be needed.³

Per-
sonnel

In earlier days, appointments to diplomatic and consular positions, as to places of many other kinds, were made by the president and Senate

¹ Under regulations dating from 1926, ministers, consuls, and other persons belonging to the Foreign Service may be called to Washington to serve (not to exceed four years) as assistant secretaries or in other posts in which they can give the Department the benefit of their first-hand experience abroad; and, similarly, higher Department officials at Washington may be assigned to duty for limited periods at foreign posts.

The best account of the history and earlier organization of the State Department is G. Hunt, *The Department of State of the United States* (New Haven, 1914). On the Department in more recent times, see G. H. Stuart, *American Diplomatic and Consular Practice* (New York, 1936), Chaps. v-vi, and books and articles cited on p. 653 below; although for present organization it is necessary to use, rather, such recent publications as those mentioned on p. 632, note 3, above. For a forward-looking interpretation of the Department's rôle, see W. H. C. Laves and F. O. Wilcox, "Organizing the Government for Participation in World Affairs," *Amer. Polit. Sci. Rev.*, XXXVIII, 913-930 (Oct., 1944). The administration of foreign relations by secretaries of state down to and including Hughes is dealt with by various writers in S. F. Bemis [ed.], *The American Secretaries of State and Their Diplomacy*, 10 vols. (New York, 1927-29).

² 43 U. S. Stat. at Large, 140. See T. Lay, "Foreign Service Reorganization," *Amer. Polit. Sci. Rev.*, XVIII, 697-711 (Nov., 1924).

³ The titles of secretary, counselor, consul, etc., by which the foreign status of members of the service is designated remained as before. For purposes of administration and interchangeability only, the common title of "foreign service officer" was superimposed upon the others.

with no required regard for fitness. Not infrequently, men of ability and experience received appointment; but too often the determining factors were personal favoritism and party service. In 1895, President Cleveland introduced the rudiments of a merit system in the consular service, and in 1906 President Theodore Roosevelt instituted a plan of competitive examinations and efficiency ratings for the appointment and promotion of consuls of all grades, including consuls-general. In 1909, President Taft started a scheme of competitive examinations in the lower grades of the diplomatic service, with provision for efficiency records as a basis of promotion. This, however, did not affect the members of the service above the rank of secretary, who, accordingly, seldom long outlived the Administrations that appointed them and rarely or never survived a change of the party in power. Furthermore, in both services the reforms rested until 1915 only on executive orders, not on statute. Here again the legislation of 1924 made notable advances. By its terms, all persons in the Foreign Service below the grade of minister are appointed only on the basis of written and oral competitive examinations of such comprehensiveness and difficulty that only well-trained college graduates can hope to pass them.¹ As needed, and in the order of their ratings, successful candidates are given preliminary or preparatory terms of a few months as salaried junior vice-consuls in near-by posts (*e.g.*, at Mexico City or Ottawa), after which they receive several months of further instruction in a foreign service officers' training school maintained in the State Department at Washington. Only then are they ready to be appointed as foreign service officers (of the lowest grade)—in whichever branch of the service there are vacancies, and with some regard to their personal aptitudes. Supplemented by later legislation—notably the Moses-Linthicum Act of 1931²—the Rogers Act also fixes salaries on a uniform scale rising from \$2,500 to \$10,000 (with moderate annual increases, and with certain travel and maintenance allowances), makes suitable provision for promotions, and establishes a retirement and disability fund to which members of the service contribute five per cent of their salaries. Indeed, the Moses-Linthicum Act rounded out the reform by classifying clerical employees as well and extending the merit

¹ As a rule, the written examinations (covering four general and four special fields) are held in September at various places throughout the country, are taken by from six to eight hundred young men and women, and are successfully passed by from sixty to one hundred. Of the latter number, the rigorous oral examinations held the following January in Washington, and stressing personal qualities and promise, usually eliminate all but twenty-five or thirty. Candidates must be between the ages of twenty-one and thirty-five, and must be designated for examination by the president. Written examinations are conducted by the Civil Service Commission for the Board of Examiners for the Foreign Service, which itself conducts the oral tests. Cf. *The American Foreign Service, General Information for Applicants and Sample Entrance Examination Questions, Revised to June 1, 1942* (Washington, Govt. Prtg. Off., 1942). Women are eligible, and, beginning in 1922, a few have been admitted to the service. Personnel matters in the service are handled by a Division of Foreign Service Personnel in the State Department.

² 46 U. S. Stat. at Large, 1207.

system to them; and altogether the service has since been on a decidedly more satisfactory basis than ever before.¹

Status of
ministers
and am-
bassadors

Although forming parts of the Foreign Service in the broader sense, ministers and ambassadors² are outside the scope of the legislation just described, and are still appointed by the president and Senate on grounds in which political and personal considerations, *e.g.*, reward for party service and for contributing to campaign funds, may weigh heavily. One can cite diplomats who have served through a long stretch of years, moving from post to post;³ but, in general, tenure is uncertain, and not unlikely to be brief, especially if the party to which the incumbent belongs soon goes out of power. To be sure, the Rogers Act has as one of its objectives the encouragement of young men of ambition and talent to make the Foreign Service a career, and to that end it requires the secretary of state to give the president from time to time the names of members of the service who have demonstrated their fitness for promotion to the grade of minister; and in later years a gratifying number of such promotions have been made. An obstacle of some seriousness arises, however, from the fact that salaries are still confined to a range between \$10,000 and \$17,500 (decidedly less than is paid to officers of corresponding grade by Great Britain and other principal states), and are widely regarded as putting the higher posts practically beyond the reach of persons not having independent means.⁴ There is advantage in a system flexible enough to permit the president to choose our highest diplomatic officers from men of standing and achievement in all professions and fields, and some of our ablest and most successful representatives abroad have been persons without previous diplomatic training or experience. But it is pleasing to know that the rank and file of the service is now so improved that he cannot find excuse for failing to draw from the "career men" in it for the higher posts with increasing frequency. By and large, our consular establishment has long been as efficient as any in

¹ In 1944, a School of Advanced International Studies and Foreign Service Training Center, closely associated with the Department of State, was established in Washington with a view to affording advanced training for persons looking to employment abroad either by the government or by private industry.

² An ambassador outranks a minister, but is not otherwise different. Since 1893, it has been the practice of the United States to send an ambassador to any country that sends one to us.

³ For example, Hugh Gibson, Nelson Johnson, and Joseph C. Grew.

⁴ Charles G. Dawes testified that it cost him \$75,000 a year to serve the country as ambassador at London, and John W. Davis that even under careful management the same position cost him between \$50,000 and \$60,000 a year. The late Professor William E. Dodd, of the University of Chicago, appointed ambassador to Germany by President Roosevelt in 1933, seems, however, to have demonstrated over a period of years that, even in a major post, an American envoy *can* live on his salary—or at least could do so before the war. In later years, the situation has been helped materially by a fairly generous system of rent allowances, post allowances equalizing the cost of living at exceptionally expensive posts, pay adjustments in instances where the conditions of exchange would seriously impair the value of the regular official salary, "representation allowances" (in the case of chiefs of mission) covering part of the cost of entertainment, and a good system of retirement allowances. It is hardly necessary to add that under present wartime conditions lavish entertaining has become a thing of the past.

the world. Notwithstanding shining exceptions, our diplomatic service has, in times past, ranked rather low. In so far, however, as our presidents, overcoming the impediments of low salaries and personal and party pressure, henceforth succeed in filling ministerial and ambassadorial positions, not with political appointees, but with men who either have come up with distinction through the secretaryships, counselorships, and similar offices or have attained equally desirable qualifications by experience in other fields, an ancient ground of reproach will have been removed; and it is gratifying to be able to record that of the two score ambassadorial posts which we maintained in 1941 ten were held by career men, and of the thirty ministerial posts, fifteen.¹ The commanding position that our nation has gained since 1917 and the ever-growing complexity of our relations abroad, both in peacetime and in wartime, demand not only an extensive but a strong foreign service—strong at the top no less than at the bottom. Appropriately enough, the Foreign Service has been termed our first line of defense.

Asked to indicate the functions of an American diplomatic representative in a foreign country, one might list the more important of them somewhat as follows: (1) to convey messages and inquiries from the home to the foreign government, and to transmit information and replies in return; (2) to cultivate friendly relations with the authorities of the foreign state and keep the way open for prompt and amicable adjustment of controversies; (3) to negotiate agreements and treaties, alone or in collaboration with specially appointed commissioners, and under instructions from the secretary of state; (4) to keep the secretary of state, and through him the president, informed on political conditions and trends abroad, and especially on international developments; (5) to watch legislation and other governmental actions in the foreign state, and make inquiry or lodge complaint if American treaty rights are threatened; and (6) to be of assistance to resident or travelling fellow-citizens, in ways that often tax both ingenuity and patience.² Naturally, the burden of responsibility will be heavier in some capitals than in others, and at times of international tension than in days of peaceful routine. But it is never light; and no mere cataloguing of duties, in the foregoing fashion, can give a complete measure of it.³ Associated with each diplo-

Diplo-
matic
functions

¹ In seven cases, these diplomats were commissioned to governments operating in exile—six in England and one in Canada. The war years have brought considerable changes in the number and distribution of diplomatic posts. Even with the enemy countries removed from the list, the number of embassies in 1944 was thirty-four (including those which had followed various governments in exile) and the number of legations (in charge of ministers), twenty-three.

² Before the outbreak of war in Europe in September, 1939, nearly 400,000 United States citizens resided abroad more or less permanently, mainly for business purposes.

³ Exceptionally realistic portrayals of what it means to be an American ambassador to an important country will be found in B. J. Hendrick, *Life and Letters of Walter H. Page* (New York, 1923-24), especially I, 159-161, and W. E. and M. Dodd, *Ambassador Dodd's Diary* (New York, 1941). Diplomatic service in general is described in J. W. Foster, *The Practice of Diplomacy* (Boston, 1906), Chaps. 1-x; P. B.

matic representative abroad, is a staff of secretaries, clerks, and interpreters, among whom front rank is taken by the first secretary of embassy (or legation, as the case may be)—a man who must always be qualified to serve as *chargé d'affaires* during the absence of his chief or when there is a vacancy.

Consular
functions

The primary function of the American consular officer,¹ at least historically, is to promote the interests of American trade abroad; and to this end he observes and reports on economic conditions in his territory, watches for new and larger openings for American goods, sends back information on the most advantageous forms of advertising and the best methods of packing and shipping commodities, and puts himself at the service of the American manufacturer, shipper, or commercial traveller engaged in studying the foreign market on the spot. This, however, is only part of the story. In addition, (1) he certifies the invoices of goods intended for shipment to the United States, and otherwise assists in the administration of our tariff laws; (2) he acts as paymaster (for civilian purposes) of the American government abroad, and also as tax-collector, *e.g.*, in connection with the federal income tax; (3) under certain conditions, he cares for the estates of Americans who die abroad; (4) he witnesses marriage ceremonies when one of the parties is an American citizen; (5) he decides disputes between masters, officers, and men on American ships, provides for stranded seamen, and may discharge seamen from their contracts; (6) he inspects and approves the passports of aliens intending to come to the United States, thus helping enforce our immigration laws; (7) he serves as peacetime business agent in securing fuel and stores for American ships; and, in general, (8) he acts as "guide, philosopher, and friend" to travelling fellow-countrymen. Far less in the public eye than the minister or ambassador, the consular official penetrates corners of the earth where diplomacy rarely or never reaches and is easily the most valuable sort of general utility man that modern government and business have developed.²

Potter, *Introduction to the Study of International Organization* (4th ed., New York, 1935), Chap. v.; and J. M. Mathews, *American Foreign Relations; Conduct and Policies* (rev. ed., New York, 1938), Chaps. xviii-xix. The diplomatic service of the United States as existing before the second World War is dealt with most fully and satisfactorily in G. H. Stuart, *op. cit.*, Chaps. vii-xvi. Cf. H. R. Wilson, *Diplomacy as a Career* (Cambridge, Mass., 1941), and H. Gibson, *The Road to Foreign Policy* (Garden City, N. Y., 1944), Chaps. iii-iv.

¹ Such officers are of various grades—consul-general (in charge of all the consulates in a country), consul, vice-consul, and consular agent.

² On the consular service, see G. H. Stuart, *op. cit.*, Chaps. xvii-xxi. In 1944, the United States maintained abroad a total of approximately 250 consular offices. For an official outline of the duties of "the efficient foreign service officer" (with no distinction as between diplomatic and consular), see Department of State, *The American Foreign Service* (Washington, 1934), 3-5.

As indicated earlier, not all of our dealings with foreign governments are carried on through ambassadors, ministers, consuls, and other members of the official foreign service. The United States is a member of some sixty permanent international organizations (see list in *U. S. Government Manual*, Summer, 1944, p. 203); and while all are regarded as "related" to the Department of State, American representation in them is provided for in many different ways, for example, through commissioners

The Rôle of the President

Acting either directly or, normally, through the instrumentality of the State Department and Foreign Service, the president is the medium through which all of our dealings with foreign states are initiated and carried on; and it is now time to bring to view some of the major activities which this rôle imposes. In the first place, the chief executive is the official channel of intercourse between our government and all foreign governments. He speaks for the nation on ceremonial occasions and receives official visitors to our shores. Subject to the Senate's right of confirmation, he appoints all of our ambassadors and ministers to other countries, and all consuls stationed there.¹ On his sole responsibility, he receives foreign ambassadors and other public ministers, and also, if necessary, dismisses them. Through the State Department, he carries on correspondence abroad, obtaining information, declaring policy, pressing claims, offering settlements, and replying to all manner of inquiries and proposals. Congress may not address any foreign power or receive any communication from one; a private citizen or corporation undertaking to engage in any discussion or negotiation with a foreign government on a matter of political significance becomes liable to fine and imprisonment. As supreme director of our official international dealings, the president's prerogatives are indeed broad; and he may go as far as he likes in

1. Carrying on foreign intercourse

named, for fixed terms or otherwise, by the president or secretary of state. Among organizations in which we thus bear a share are the International Labor Organization, the United Nations Relief and Rehabilitation Administration, the International Bureau of the Universal Postal Union, the International Bureau of Weights and Measures, the International Institute of Agriculture, the Permanent (Hague) Court of Arbitration, and the Pan-American Union. We refused to join the League of Nations, but eventually "coöperated" with it in numerous activities; in the Permanent Court of International Justice ("World Court"), closely associated with the League, we refused to have any part. Assuming that out of the present war will come a new scheme of international organization aimed at preserving world peace, and that the United States will be a major participant, we may anticipate that in the resulting council and assembly of delegates many matters will be handled which otherwise would devolve upon our regular diplomatic representatives in foreign capitals. And of course numerous Americans will hold positions of various sorts in the new organization, just as did almost three hundred (serving privately) in the League of Nations and its auxiliary agencies.

¹ Indeed, he may employ "special," "personal," or "secret" agents abroad without procuring senatorial consent at all; and nearly every president, from Washington onwards, has done so. Technically, such agents are not officers of the United States, and they can be paid out of the president's "contingent fund," unless Congress makes special appropriations for them. But their services, diplomatic or semi-diplomatic, may be quite as important as those of ministers and ambassadors, as, for example, were those of Col. E. M. House as special emissary of President Wilson in Europe during World War I. Both Presidents Hoover and Franklin D. Roosevelt employed the late Norman H. Davis for years as an "ambassador-at-large" charged with attending conferences, carrying on discussions, and in general sounding out European authorities on the subjects of disarmament and collective security. Myron C. Taylor was sent to the Vatican as the President's representative in 1940 and on several other occasions to discuss matters relating to world peace (the United States does not maintain regular diplomatic relations with the Vatican); Harry Hopkins was dispatched to Great Britain in 1941 to obtain information concerning that country's war needs; and the late Wendell L. Willkie, during a visit to London early in 1941 and later wartime visits to Russia, China, and other lands, executed commissions given him by the President.

exercising them personally—even to the extent of managing the country's foreign relations practically from his own desk, as did President Wilson during the first World War, or going abroad to lead in the negotiation of a great international settlement, as did the same chief executive when peace was to be made in 1919, or meeting and conferring with representatives of foreign governments, as President Hoover met and talked with the British prime minister, Ramsay MacDonald, at a summer camp in Virginia in 1929, or as President Franklin D. Roosevelt met, talked, and reached conclusions with Prime Minister Winston Churchill and Marshal Joseph Stalin on several occasions during the present war.¹

2. Recognition

Out of this presidential function of representing the nation in its dealings abroad grows a second important power, namely, that of recognition—by which is meant the authority to determine what the official American attitude shall be toward an unsettled or changed political situation in a foreign land. The constitution has nothing to say on the subject, and at various times it has been argued that Congress possesses the power concurrently with the president. International usage, however, makes it strictly an executive function; the power to appoint and receive envoys would certainly make it such in the United States; and precedent, backed by judicial opinion, places it wholly in the president's hands, subject only to the power of the Senate to confirm diplomatic appointments, and to the power of both houses to vote foreign service appropriations.

The question of recognition arises in connection with two or three main situations. One of these is where a newly created state is seeking acceptance into the family of nations. After 1817, President Monroe recognized the newly arisen Latin American republics by sending ministers to, and receiving others from, them. In 1903, President Theodore Roosevelt recognized Panama by receiving a minister, thereby paving the way for the agreement under which the Panama Canal was later built. On the other hand, Presidents Hoover and Franklin D. Roosevelt steadfastly refused to recognize the new "state" of Manchoukuo established under Japanese auspices on Chinese soil in 1932. New states can arise only from the dismemberment of old ones, and this makes recognition in such cases an especially serious matter. A second type of situation

¹ In August and September, 1940, President Roosevelt directly and personally carried on discussions (using trans-Atlantic telephone when necessary) with Prime Minister Churchill looking to the exchange of American over-age destroyers for leases of sites for American naval bases in British possessions in the Western Hemisphere. About the same time, he more than once talked at the White House with Prime Minister King about United States-Canadian coöperation on defense plans. In August, 1941, he met Churchill on the high seas, discussed with him the war situation and the problems of American assistance to Britain, and joined with him in promulgating an "Atlantic Charter" embodying principles to be adhered to in establishing a new world order after the termination of hostilities. On several later occasions, Roosevelt and Churchill met in Washington or Quebec, and three times during the war the President crossed the Atlantic for conferences, on one occasion traveling as far as Teheran, and on another (including the Yalta conference of February, 1945) absenting himself from the country some five weeks.

is where, as a result of revolution, one political régime in a country has been replaced by another. After the U.S.S.R. had waited sixteen years for American recognition, President Franklin D. Roosevelt yielded, in 1933, by inviting President Kalinin, of the All-Union Central Executive Committee at Moscow, to send a representative to Washington for conference, and by concluding a treaty with this emissary, Foreign Commissar Litvinov. On the other hand, the downfall of the revolutionary president Huerta in Mexico, in 1915, came almost entirely as a result of President Wilson's refusal to have any dealings with the régime which he headed. With mistrust later proved to have been justified, President Roosevelt recognized the Vichy government of France in 1940; although in this case the régime recognized purported to be substantially a continuation of one wrecked by German conquest.¹ Still another type of situation opens the way for recognition on somewhat different lines, namely, where, an insurrection having arisen in a country, the president formally recognizes the insurgency, or even the belligerency, of the insurrectionists, thereby giving them (so far as the United States is concerned) certain rights which they would not have as mere rebels. President Cleveland thus recognized a state of insurgency in Cuba in 1895. In all matters of recognition, the principle is that the president may go as far as he likes in recognizing international *facts*; recognition before facts exist is premature, and may become a cause of war.²

"Under our system of government," the courts have declared, "the citizen abroad is as much entitled to protection as the citizen at home";³ and it falls to the president, as chief executive and director of our foreign relations, to see that such protection is duly extended, whether on the basis of treaty guarantees or otherwise. If an American sojourning in a foreign land or travelling on the high seas is mistreated and cannot obtain justice, the president, acting through the State Department, may make demands in his behalf, and may go to any lengths short of a declaration of war to obtain redress for him.⁴ Similarly, it is the president's duty—up to the limits of national authority—to see that protection is extended to aliens legally domiciled in the United States. He must execute all provisions of the constitution, the national laws, and treaties bearing on their rights; and while he has no way of compelling state authorities to extend protection in matters outside the scope of national jurisdiction, he may admonish them to be mindful of alien rights and may instruct district attorneys to lend aliens needed legal aid. In time of war abroad,

B. Protection of citizens abroad and of alien residents

¹ With France finally delivered from German domination, the President, in October, 1944, recognized the régime of General De Gaulle as constituting a provisional government of the reviving Republic.

² On recognition in general, see E. S. Corwin, *The President's Control of Foreign Relations*, 71-83; J. M. Mathews, *American Foreign Relations; Conduct and Policies* (rev. ed.), Chap. xxi; and references cited on p. 654 below.

³ *Durand v. Hollins*, Fed. Cas. No. 4136 (1860).

⁴ E. M. Borchard, *The Diplomatic Protection of Citizens Abroad* (new ed., New York, 1927). It is hardly necessary to add that the treaty-making power is used freely in obtaining recognition of and protection for citizen rights abroad.

he may be of assistance to both aliens and citizens by issuing a proclamation of neutrality calling attention to rules of international law and to statutes forbidding various unneutral acts. When the United States is itself at war, however, the rights of aliens of enemy nationality become only such as international law recognizes in situations of the kind, and the president is not obligated beyond that point.¹

Treaties and Executive Agreements

4. Treaty-making

A main instrumentality for regulating and stabilizing international relations is treaties; and the constitution provides that the president "shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the senators present concur."²

Under the Articles of Confederation, Congress made treaties; and the framers of the constitution at first thought of giving the power to the Senate. As, however, the concept of the presidency grew in their minds, the opinion developed that it would be better to assign treaty-making, along with the general management of the country's foreign relations, to the chief executive, associating with him the Senate as an advising and restraining council. The House of Representatives was deliberately omitted from the plan in the interest of "secrecy and despatch"; and the assent of two-thirds, rather than a simple majority, in the Senate was provided for in order to prevent treaties from being made too lightly, and also to give sectional interests like the New England fisheries added protection against being "sold out."³

Presidential initiative

The language of the constitution clearly associates the Senate with the president throughout the entire process of making a treaty; and not only do passages in *The Federalist* indicate that this is what the framers had in mind, but President Washington actually began his treaty-making (with the Southern Indians in 1789) on that basis. A few years of experience demonstrated, however, that it was better for the president to "make" the treaty and only afterwards to seek the Senate's "advice and consent"—such consent being to the final act of ratification, which the president alone is competent to perform.⁴ To be sure, either branch of Congress, or the two concurrently, may, by resolution, advise or request that a given treaty be negotiated; and the president may, in advance or during the course of negotiation, consult with individual senators, or even the Senate as a whole.⁵ But unless the chief executive chooses to

¹ See pp. 124-126 above.

² Art. II, § 2, cl. 2.

³ R. E. McClendon, "Origin of the Two-Thirds Rule in Senate Action on Treaties," *Amer. Hist. Rev.*, XXXVI, 768-772 (July, 1931).

⁴ On the way in which our treaty-making authority "split into two authorities," see E. S. Corwin, in J. B. Whitton [ed.], *The Second Chance; America and the Peace* (Princeton, N. J., 1944), 143-150.

⁵ There are only about a dozen instances in which the Senate as a whole has been consulted—one of them involving Polk's procurement from the Senate in 1846 of a promise in advance to assent to a convention with Great Britain settling the question of the Oregon boundary. On the unpleasant outcome of Washington's attempt to

set the necessary machinery in motion, no negotiation can be started; he can begin a negotiation regardless of the desire (and even without the knowledge) of either branch of Congress; and rarely indeed is the Senate as a body given any chance to express itself on a proposed treaty until the completed instrument is transmitted to it. Short of simply withholding assent to ratification, the most that the Senate can do is to assent on certain conditions, or to attach reservations which will make it necessary for the president to renew negotiations with a view to securing the foreign government's acceptance of the proposed qualifications or other changes. In exercising his powers of initiative and direction, the president may work through the regular diplomatic representative accredited to the foreign government concerned; or he may appoint a special plenipotentiary or commission to go abroad for the purpose; again, he may cause the negotiation to be carried on in Washington through the secretary of state; or, finally, he may undertake, or at least participate in, the negotiation himself, as did President Wilson in connection with the Treaty of Versailles in 1919. When the treaty is completed, he, furthermore, has full freedom to submit it to the Senate, return it to the negotiators for revision, or drop it altogether. He may hold it back because he considers it unsatisfactory, or because he recognizes that submission of it to the Senate would be useless.

"A treaty entering the Senate," wrote John Hay after six years of experience as secretary of state, "is like a bull going into the arena; no one can say just how or when the final blow will fall—but one thing

The
Senate's
share in
treaty-
making

consult with the Senate orally on his Indian treaty, see D. F. Fleming, *The Treaty Veto of the American Senate* (New York, 1930), 16-21. As a matter of expediency, the president and secretary of state usually keep in close touch with at least the members of the Senate foreign relations committee when an important negotiation is in progress, sounding out sentiment in this way on pending proposals and ascertaining how far it is safe or wise to go in this direction or that—a precaution the more necessary because, under the two-thirds rule, a treaty will usually have to have the support of members of both political parties. The president may, indeed, make one or more senators members of a negotiating commission. Thus, three of the five commissioners appointed by President McKinley to negotiate a treaty of peace with Spain in 1898 were senators, one of them being chairman of the foreign relations committee. Two of the four commissioners who signed, on behalf of the United States, the treaty concluded with Great Britain, France, Italy, and Japan at the Washington Conference on the Limitation of Naval Armaments in 1921-22 were senators, one of them again being the chairman of the foreign relations committee. Two of the five commissioners who signed the London Naval Treaty of 1930 were members of the upper house, and so were two of the American delegates to the World Monetary and Economic Conference at London in 1933, and to the San Francisco conference of the United Nations in 1945. President Wilson was widely criticized because he did not include one or two senators in the commission which represented the United States in negotiating the Treaty of Versailles in 1919; and the outcome showed that he at least could not have lost anything by doing so. On the other hand, it should be noted that the plan of including senators in commissions to negotiate treaties has been opposed vigorously, both in the Senate and outside, on the ground that it puts the senatorial members in the position of helping formulate proposals which they will be expected to pass upon later as members of a separate branch of the government, and also on the ground that it is incompatible with at least the spirit of the constitutional stipulation that "no person holding any office under the United States shall be a member of either house during his continuance in office" (Art. I, § 6, cl. 2)—although membership in an international conference can be construed as not properly an "office." Cf. D. F. Fleming, *op. cit.*, 27-32.

is certain—it will never leave the arena alive.”¹ This statement is much too strong, as is evidenced by two or three major facts: (1) no treaty was rejected outright by the Senate until 1824; (2) the total number so rejected throughout the history of the country to 1935 is only sixty-two; and (3) while the Senate either failed to act upon, or insisted on amendments or reservations to, 152 treaties (to the date mentioned), it unconditionally approved some nine hundred, or more than four-fifths of the entire number presented to it.² Quite a number of treaties slip through with no opposition at all. Those that stir controversy, however, encounter a genuine hurdle in the two-thirds rule; and it must be admitted that most of the treaties that have come to grief have been of first-rate importance, *e.g.*, the treaty for the annexation of Texas in 1844, the Taft-Knox arbitration treaties of 1911-12, the Treaty of Versailles in 1920, the St. Lawrence Waterway Treaty in 1934, and the protocol for adherence to the Permanent Court of International Justice (World Court) in 1926 and 1935; and, further, that many which finally emerge triumphant do so only after a great parliamentary battle, calling into play every sort of pressure from the White House. In numerous cases, beginning with the Jay Treaty in 1794, the Senate’s consent to ratification has been qualified by reservations, amendments, and interpretations—in other words, by what Woodrow Wilson called “treaty-marring.” These are usually tantamount to changes in the treaty, and if either the president or the foreign government is unwilling to accept the modifications involved, the treaty fails. A number of arbitration treaties were killed in this way in 1904, and others in 1912; likewise the protocol for adherence to the Permanent Court of International Justice in 1926.³ At any time while a treaty is pending in the Senate, the president may recall it, either because circumstances have so changed that he no longer favors it or because he perceives that it is doomed to defeat. Even after the Senate has given its consent, a treaty may be held up. It remains for the president to ratify it—and, upon being apprised of ratification by the other government (or governments), to promulgate it;

¹ W. R. Thayer, *Life and Letters of John Hay* (Boston, 1920), II, 393. Alluding to the necessity under which a foreign power finds itself of dealing first with the State Department at one end of Pennsylvania Avenue and then with “another State Department at the other end,” Mr. Walter Lippmann once remarked that “a diplomatic affair with the United States is like a two-volume novel in which the hero marries the heroine at the end of the first volume and divorces her triumphantly at the end of the second.” *Foreign Affairs*, IV, 218-219 (Jan., 1926).

² D. F. Fleming, “The Role of the Senate in Treaty-Making,” *Amer. Polit. Sci. Rev.*, XXVIII, 583 (Aug., 1934). In a period of less than six years (Dec., 1924, to Aug., 1930), the Senate assented to the ratification of 106 treaties, with forty-one different nations. On a day in June, 1934, it approved twelve in a single hour. Cf. “List of Treaties Submitted to the Senate, 1789-1934, 1935-1939, 1940, 1941, 1942,” *Department of State Publications*, Nos. 765, 1516, 1620, 1751, 1894.

³ “While all kinds of treaties have incurred the Senate’s displeasure, it has consistently emasculated only one type, *i.e.*, those for the pacific settlement of disputes. It is upon the Senate’s action upon this class of treaties that opinion upon the usefulness of its rôle in treaty-making must divide,” D. F. Fleming, *The Role of the Senate in Treaty-Making*, 583.

and he has the option of refusing to take these final necessary steps, although naturally he will do so only under very unusual circumstances.

Formerly, treaties were almost invariably considered in executive session behind closed doors, although some, *e.g.*, the Taft-Knox arbitration treaties of 1911, were debated with both press and public in the galleries. In 1929, a new Senate rule put an end to private sessions in general, and since that date even treaties have been expected normally to be dealt with in the open. The rule, however, does not preclude closing the doors for discussion of treaties, or of anything else, if the Senate so determines.

For a hundred years or more, the treaty procedure outlined served, on the whole, acceptably. In later days, however, it has given rise to a great deal of dissatisfaction. To begin with, the two-thirds rule, although conceded to have been perhaps desirable under eighteenth-century conditions, is alleged to be out of harmony with our present-day democracy, grounded as it is upon the principle of government by ordinary simple majority.¹ A second objection often voiced is that the rule makes it too easy for special interests to hold up or defeat a treaty to which they take exception. Inasmuch, too, as a very large proportion of senators are elected by predominantly rural populations in thinly peopled agricultural states, the great weight assigned to the Senate in treaty-making gives, in the opinion of some, too much power in this particular domain to populations remote from the coasts and more or less provincial in their outlook. Yet another complaint is that the House of Representatives is to all intents and purposes coerced into voting appropriations and enacting legislation required for putting into effect treaties with the making and ratification of which that branch has had nothing to do.² Finally may be mentioned the ground-swell of criticism traceable since 1920 to the conviction of many that but for the obstructionist attitude of a Senate minority, the United States would, as a member of the League of Nations and adherent to the World Court, have contributed to international coöperation a force and vigor that might possibly have changed the entire course of world events in the past unhappy decade.

There are, of course, those who would leave matters as they are; and they undoubtedly include a substantial majority of the senators themselves. But quite a number of people who have thought seriously

Dissatisfaction with the existing system

Proposed changes

¹ Forty-nine senators constitute a quorum with power of life and death over a treaty; seventeen of the forty-nine could prevent a two-thirds majority being obtained; and the seventeen could come from states that under the 1940 census contained only about one-thirteenth of the country's population. No treaty is likely ever to be disposed of under such minimal conditions; but a system that makes it even theoretically possible for such a thing to happen seems to some people objectionable.

² On this ground, the House early set up a claim to a share in the treaty-making power. In his message on the Jay Treaty in 1796, Washington, however, urged that after a treaty has been duly ratified, Congress is morally, if not legally, obligated to take any action required for enabling the commitments under it to be lived up to; and although the issue was revived in connection with the Treaty of Ghent in 1814 and the treaty for the purchase of Alaska in 1867, the principle thus laid down has consistently prevailed.

about the subject favor more, or less extensive changes. Two plans seem most worth considering. The first would admit the House, as an appropriating body, and as the more truly representative chamber, to a share in the treaty power, on such a basis that assent to ratification would be by simple majority in the two houses, thus assimilating it to the process of ordinary legislation, except that the president would have, as now, exclusive initiative and also the final discretionary right of ratification. In operation, this plan might tend to greater delay—less of the “despatch” that the constitution’s framers were concerned about (although under the present system the Senate sometimes displays but little “despatch”); on the other hand, probably fewer treaties would be defeated by minorities; and constitutional amendments providing for the plan have been introduced in Congress many times, including one in 1944.¹ The second main proposal is that the Senate continue to act alone as now, except by simple majority instead of two-thirds. Even at present, a treaty can be assented to by as few as thirty-three members (being two-thirds of a quorum). But treaties that stir controversy will always call out a far heavier vote than this minimum figure suggests. The vote may, indeed, closely approach the maximum total of ninety-six (requiring sixty-four for giving assent). Hardly any one proposes assent by as small a fraction as a simple majority of a quorum, which would be only twenty-five. But even if the requirement were changed to simple majority (forty-nine) of the entire membership, the difficulty of procuring assent to major treaties would be lessened. This plan has been supported almost as impressively as the first, although, when the two are weighed, the balance of advantage would seem to lie with the two-house proposal.² One cannot predict that either change will be made; a constitutional amendment would be required, and the two-thirds vote

¹ Approved in this instance by the House judiciary committee by a vote of 14 to 4. In this connection, it may be noted that important actions in relation to international affairs have sometimes been taken through the medium of a joint resolution of the two houses, requiring only a majority vote in each. Texas and Hawaii were annexed in this way in 1845 and 1898, respectively; war with the Central Powers was officially terminated in this manner in 1921; and by a similar procedure the president was authorized in 1934 to accept membership for us in the International Labor Organization at Geneva. For a recent instance of such use of joint resolutions, see H. W. Briggs, “Treaties, Executive Agreements, and the Panama Joint Resolution of 1943,” *Amer. Polik. Sci. Rev.*, XXXVII, 688-691 (Aug., 1943).

² A proposed constitutional amendment providing for senatorial assent to treaties by majority vote was frowned down in committee as recently as March, 1944. On the other hand, a Gallup poll of two months later showed sixty per cent of the persons canvassed to be favorable to the proposal.

A third plan, it may be noted, is to take power over treaties from the Senate entirely and give it to the House of Representatives. See S. W. McCall, “Again the Senate,” *Atlantic Mo.*, CXXVI, 395-403 (Sept., 1920). This, however, is too drastic to deserve serious consideration. A fourth possibility—advocated in W. McClure, *International Executive Agreements* (New York, 1941)—is to by-pass much of the problem of treaty-making by substituting the use of Congress-confirmed executive agreements. As will be indicated presently, our foreign relations are actually being conducted increasingly on this basis. In so far as agreements were deemed to require the assent of the two houses, the plan would not differ materially from the first one mentioned above—except, perhaps, in that congressional approval or authorization might be given in advance.

in the Senate necessary to place either proposal before the states would be difficult to obtain. Another great controversy such as that stirred by the Versailles Treaty (and such as—despite the precautions being taken—may yet occur in connection with terminating the present war) would, nevertheless, impart much momentum to a movement which already has spread, in a limited degree, to the Senate itself.¹

Once promulgated, a treaty becomes, from the international point of view, a contract between the United States and the nation or nations constituting the other parties, and from the domestic point of view, an addition to the law of the land, supreme and enforceable like any other portion of that law. The courts of the states must give it full effect; and if their construction of its provisions proves objectionable to any litigant, appeal can be taken to the federal Supreme Court. Of course, not all treaties are, or are intended to be, permanent. Some expressly provide for their own expiration; some are terminated by war; some are replaced by new agreements; some are abrogated by being "denounced" by one or more of the parties. When it is desired in this country to dispense with a treaty, or some portion thereof, our government is likely to seek an agreement to that end with any nation, or nations, concerned. In default of such agreement, however, the president may, on his own authority, simply proclaim the treaty at an end; or he may take such action with the support of a joint resolution of Congress; or Congress itself may make any of the treaty's provisions of no legal effect by enacting legislation inconsistent with them. Although treaties are "law of the land," the Supreme Court has said that they are no more truly such than are acts passed by Congress. Invariably, the Court has been reluctant to construe a statute as in violation of a treaty; but when there is manifest conflict, the later in date prevails.² Neither a court decision not a statute can, however, abrogate a treaty as an international contract. Although rendered unenforceable domestically by such means, a treaty preserves its international status until revoked by executive action; and in the meantime the foreign power may construe an adverse judicial decision or statute as a breach of contract entitling it to reparation by an international proceeding.

Often enough, a treaty is of such a nature as to require legislation to make its provisions effective. Can a treaty be made a means of conferring

¹ The relations of president and Senate in treaty-making are discussed at length in W. W. Willoughby, *Constitutional Law of the United States* (2nd ed.), I, Chaps. xxxiii-xxxvi; J. M. Mathews, *American Foreign Relations; Conduct and Policies* (rev. ed.), Chaps. xiv, xviii-xix; and especially K. Colegrove, *The American Senate and World Peace* (New York, 1944); D. F. Fleming, *The Treaty Veto of the American Senate* (New York, 1930), and "The Role of the Senate in Treaty-Making," *Amer. Polit. Sci. Rev.*, XXVIII, 583-598 (Aug., 1934); R. J. Dangerfield, *In Defense of the Senate; A Study in Treaty-Making* (Norman, Okla., 1933); and W. S. Holt, *Treaties Defeated by the Senate* (Baltimore, 1933).

² *Chinese Exclusion Cases*, 130 U. S. 581 (1889). See J. J. Lenoir, "Treaties and the Supreme Court," *Univ. of Chicago Law Rev.*, I, 602-622 (Mar., 1934).

Can
treaties
confer
legisla-
tive
powers?

on Congress legislative power not otherwise possessed? Not if one accepts the view of Thomas Jefferson, who contended that the constitutional provision on treaty-making merely sets forth a procedure for exercising granted powers and is not itself a substantive grant. The Supreme Court, however, has ruled differently. In a case decided in 1920, it held that the treaty-making power is a distinct grant of authority to the national government, and broad enough to be applicable to all subjects of national concern and capable of being handled only by international negotiation;¹ from which it follows that legislative action in pursuance of treaty provisions may properly extend to matters otherwise exceeding congressional competence, even to such as normally are within the reserved (including police) powers of the states. In point of fact, legislation of this character has many times been enacted and enforced.

5. Ex-
ecutive
agree-
ments

Treaties can be ratified and become operative only with the advice and consent of the Senate. But not every agreement entered into with a foreign government takes the form of a treaty. Increasing numbers, instead, are "executive agreements," for which— notwithstanding that as a rule they are to all intents and purposes treaties—no senatorial consent is deemed to be required.² In some cases, *e.g.*, postal conventions and trade agreements, such agreements rest upon authority conferred in advance by blanket act of Congress.³ The majority of them, however, are concluded by the president (directly or through agents) without such authorization—sometimes in pursuance of a treaty, sometimes as commander-in-chief of the armed forces, and occasionally simply as the country's sole organ for direct official dealings with foreign states. And not only are they upheld by the courts as "supreme law of the land,"⁴ but the limits to which the president may carry them are nowhere defined.⁵ Many agreements deal with minor matters which, on their face, do not call for a treaty—for example, petty pecuniary claims of American citizens against foreign governments. But others relate to affairs of prime importance.⁶ Indeed, an executive agreement may become frankly a means of evading—temporarily, at all events—the necessity of going

¹ *State of Missouri v. Holland*, 252 U. S. 416.

² The term is not a fortunate one, because, strictly, treaties themselves are executive agreements. In common usage it has, however, acquired the special meaning here given it.

³ On trade agreements, see pp. 510-511 above.

⁴ As in *United States v. Belmont*, 301 U. S. 324 (1937). The federal Supreme Court has never held an international act unconstitutional.

⁵ As a consequence, in all of his foreign dealings (except when a charge upon the public treasury is involved) the president has a three-way choice: to negotiate a treaty and then submit it to the Senate, to secure advance consent of Congress to an executive agreement, or to act alone. His decision upon which course to pursue, at least when the matter at stake is important, will be influenced by the political situation at the time and perhaps by other considerations. But all three methods are equally constitutional and valid.

⁶ Examples include the Hay open-door notes of 1900; the Boxer protocol with China in 1901; the "Gentleman's Agreement" of 1907 with Japan terminating the immigration of Japanese laborers; the Root-Takahira notes of 1908 on the open door in China; the agreement with Panama in 1914 for enforcing the neutrality

to the Senate with a treaty. In 1905, President Theodore Roosevelt worked out a treaty with Santo Domingo stipulating that the United States should guarantee the integrity of that republic and should take over the administration of the customs with a view to settling foreign claims and warding off European intervention. The Senate refused to consent to the treaty; whereupon the President entered into a *modus vivendi* with the Dominican government on precisely the lines desired; and for two years the protectorate was maintained on this basis alone. In 1907, a treaty regularizing the arrangement was at last assented to and ratified.¹ President Taft, in 1911, entered into a similar agreement with Nicaragua, which was not superseded by a treaty until 1916. So far as content goes, there is therefore no clear line of demarcation between executive agreements and treaties. There is—or at any rate has been in the past—some presumption that executive agreements which deal with important matters are preliminary to treaties. But this is not necessarily true; and, outside of the constitutional principle that they may not entail outlays of money not authorized by Congress, and the further practical restriction that may arise from disinclination to incur senatorial or popular displeasure, there is really no limit to the extent to which the agreement-making power may be stretched.²

of the Panama Canal; the somewhat unfortunate Lansing-Ishii agreement with Japan in 1917; the agreement entered into by President Franklin D. Roosevelt with the British government in 1940 under which the United States turned over to Britain fifty over-age destroyers in return for ninety-nine-year leases of several sites in British possessions on this side of the Atlantic for the development of American naval bases; the agreements with Denmark's government-in-exile in April and July, 1941, under which the United States acquired the right, in the one case, to establish air bases and other military and naval facilities in Greenland and, in the other, to undertake a naval occupation of Iceland, both aimed at curbing or forestalling German armed operations in the North Atlantic; numerous agreements with allied nations under the Lend-Lease Act of 1941 and the United Nations Relief and Rehabilitation Agreement of 1943-44. The Rush-Bagot convention of 1817 with Great Britain for the limitation of naval forces on the Great Lakes was originally an executive agreement, although in the following year it was given a treaty basis. On March 21, 1941, President Roosevelt transmitted to Congress the text of an executive agreement recently signed in Ottawa providing for completion of essential links in the long-contemplated St. Lawrence deep waterway and power project—an agreement essentially in lieu of the treaty on the subject rejected by the Senate in 1934. This particular agreement, however, could be made effective only by a congressional appropriation, which was refused. The effort was renewed late in 1944, when the agreement was slipped into a rivers and harbors bill—but with the same outcome.

¹ *Foreign Relations of the U. S.* (1905), 334-343; T. Roosevelt, *Autobiography*, 551-552. The only substantial difference between the "agreement" and the later "treaty" was that the latter was ratified by the Senate. Under an executive agreement of September 24, 1940, the United States finally relinquished the receivership.

For a recent and very full treatment of the general subject, see W. McClure, *International Executive Agreements* (New York, 1941); and cf. K. Colegrove, *The American Senate and World Peace*, Chap. v; H. M. Caturdal, "Executive Agreements; A Supplement to the Treaty-Making Procedure," *Geo. Washington Law Rev.*, X, 653-669 (Apr., 1942); *Anon.*, "Executive Agreements and the Treaty Power," *Columbia Law Rev.*, XLII, 831-843 (May, 1942). Mr. McClure finds that the total of executive agreements entered into by our government between 1789 and February, 1941, is "well over 1,250—a third more than the number of treaties." Since 1929, the texts of such agreements have been published in the State Department's *Executive Agreement Series*.

² The matter of financial commitments gave rise to considerable controversy in connection with the United Nations Relief and Rehabilitation Convention drawn

The Shaping of Foreign Policy—President, Congress, and People

One of the consequences of America's comparative remoteness, until recently, from the great theaters of European and Far Eastern politics has been the traditional disposition of our government to refrain from commitments in advance as to courses to be pursued internationally amid changing conditions and circumstances. Regardless, however, of how strongly a government may desire to keep its hands free to deal with international situations as they arise, it inevitably develops viewpoints and principles which eventuate in accepted "foreign policies." One thinks at once, in our own case, of the Monroe Doctrine, the doctrine of equal opportunity ("open door") in China, and the principle of aloofness from European quarrels and wars, adhered to consistently until we found one conflagration after another spreading toward our own shores.

Rôle
of the
president

The shaping of policies such as these and scores of others touching an infinite variety of situations and interests is, of course, in our country, not the function of any one branch or department of government alone. The supreme maker of our foreign policy is, nevertheless, the president (with much collaboration from the Department of State); even when not strictly the author of a given policy, he commonly becomes such, to

up by a conference of United Nations representatives at Hot Springs, Virginia, in 1943. In the Senate, a sub-committee of the foreign relations committee found that the instrument as drafted was to be regarded as an executive agreement and not referred to the Senate, notwithstanding that it involved "practically illimitable obligations for the United States practically in perpetuity," and as a result of Senate protest the agreement was rewritten so as to contain no commitment beyond the expenditure of such moneys as should be specifically appropriated from time to time by Congress for the purpose. In connection with this episode, and on several other occasions of late, *e.g.*, when the Panama joint resolution of 1943 (see p. 646, note 1, above) was being discussed, and when, late in 1944, a bill authorizing the executive agreement between the United States and Canada mentioned above (for construction of a seaway and power project) was before Congress, much criticism has been directed toward the White House for so frequently flouting the prerogatives of the upper branch and evading the plain intent of the constitution in treaty-making. Among the authors cited above, McClure favors still freer use of the device and Colegrove is inclined to agree unless the strangle-hold of the Senate on treaty-making can be broken, which he thinks is most to be desired.

Promises may be made and understandings established, fully tantamount to agreements, without any knowledge on the part of either Congress or the public. A classic example is President Theodore Roosevelt's agreement with Japan on Far Eastern policy at the close of the Russo-Japanese war, first brought to light some years ago when the Roosevelt papers in the Library of Congress were explored. See T. Dennett, *Roosevelt and the Russo-Japanese War* (Garden City, 1925), 112-114. It is even possible for an agreement to be entered into with no papers signed, and simply by long-distance telephone.

A matter of high interest and importance will be the relative rôles of executive agreements and treaties in the international settlements liquidating America's participation in World War II. Some people have believed that there will be few treaties, if any—certainly no single treaty comparable to the Versailles Treaty of 1919; and they have pointed to the declarations and announcements coming out of the conferences at Teheran, Cairo, Yalta, Dumbarton Oaks and San Francisco as being in effect executive agreements, starting the chain. At the date of writing (April, 1945), it seemed more likely, however, that agreements of this nature would prove, in at least most instances, merely preliminary to treaty settlements. President Roosevelt had carefully cultivated Senate coöperation and good-will preparatory to treaty action; and certainly the majority of senators were prepared to insist that they be given opportunity to perform their constitutional function.

all intents and purposes, by declaring it to the world and taking the necessary steps to put it into effect. When Washington proclaimed American neutrality in 1793, and in his Farewell Address warned his countrymen against political entanglements with Europe, he started the country on a course of "isolation" from which only the most extraordinary emergencies have ever availed to swerve it completely. Monroe, in 1823, voiced in a message to Congress certain principles concerning foreign political activities in the Western Hemisphere which, under the name of the Monroe Doctrine, developed into one of the most enduring and important of all our foreign policies. McKinley, through his secretary of state, John Hay, irrevocably committed the nation in 1899 (and, in effect, a number of other nations as well) to the principle of the "open door" in China. Theodore Roosevelt, Taft, and Wilson brought a number of Caribbean republics under United States supervision and, for better or worse, left us a policy of maintaining Latin American financial protectorates which only lately yielded to President Franklin D. Roosevelt's newer "good neighbor" policy. Wilson in 1915 and Hoover in 1932, through their respective secretaries of state, Bryan and Stimson, made it American policy to withhold recognition from international agreements or arrangements in the Far East interfering with the territorial or administrative integrity of China or the open door for trade and other enterprise in that country. During the earlier stages of World War II, President Franklin D. Roosevelt led in formulating and carrying out the national policy under which the United States first severely strained and later frankly abandoned its neutral position in order to give aid to Great Britain and other fighting nations, which, in the Chief Executive's opinion, must at all costs be kept from going down. Similarly, he bore full responsibility for the government's unyielding opposition to Japan's proposed "new order" in Eastern Asia, bringing the two countries to the brink of war by 1941, and precipitating them into actual combat before the year ended, with Germany and Italy almost simultaneously declaring war upon us as part of a concerted Axis attack. In the Atlantic Charter of 1941, he joined with Prime Minister Churchill in proclaiming broad postwar international policies to which the United States was solemnly committed on his sole responsibility; and policies were further determined and declared throughout the war, frequently as a sequel of conferences with spokesmen of Allied states. When a foreign complication arises, or a new international problem presents itself, it is the president who has the first opportunity to say what the attitude of the nation shall be; and by the stand that he takes he can so put the country on record that it will be next to impossible for Congress, or even a later president, to assume a different position. As we shall see, he may even lead the nation into war; for although he cannot declare war, he can adopt an attitude or create a situation, *e.g.*, by refusing to yield in a controversy with a foreign government, that may make war unavoidable:

Congressional
limitations
and controls

Nevertheless, the president does not long play a lone hand, or always have his own way. A zealous Congress forced upon a reluctant chief executive the War of 1812, and likewise the intervention in Cuba in 1898 which led to the war with Spain, the annexation of the Philippines, and a long train of other fateful consequences. An unconvinced Senate balked President John Quincy Adams in his Pan-American policy, Pierce in his Cuban policy, Grant in his Dominican policy, Cleveland in his Hawaiian policy, and Wilson in his endeavor to put the United States into the League of Nations. One of the most vigorous and important standing committees in each of the two branches is the committee on foreign relations,¹ in which, in connection with proposed legislation (and, in the Senate committee, with treaties) problems of foreign policy receive extended discussion, sometimes supplemented by lively public hearings.² Special committees, too, may be set up to investigate areas of presidential action on policy in this field. Whatever funds are required for carrying on our relations abroad (including those needed for executing the provisions of treaties) are, of course, obtainable only through appropriations voted by Congress. The national government's exclusive control over foreign relations gives Congress plenary *legislative*, even as it gives the president plenary *executive*, power in this domain; and once Congress has legislated—on immigration, merchant marine, foreign commerce, "lend-lease" arrangements, and what not—the president is quite as much obligated to execute the resulting statutes as if they related to domestic affairs. The upshot, therefore, is that, while in foreign relations the president appears to have a singularly free hand, and while he does normally enjoy much liberty of action, our dealings abroad are, after all, controlled by no single branch of the government, but rather are shaped, even if somewhat unequally, at the two ends of Pennsylvania Avenue.³

The rôle
of public
opinion

Back of both president and Congress, however, stand the people; and, in the final analysis, no significant program of foreign policy can be carried out that has not the support of the voters, evidenced through elections, the press, and in other ways. "No matter," ex-Secretary of State Hull has remarked, "how brilliant and desirable any course may seem, it is wholly impracticable and impossible unless it is a course which

¹ "Foreign affairs," in the case of the House of Representatives.

² A joint foreign relations committee of the two houses has sometimes been proposed; also some sort of a council on foreign relations composed of cabinet members, senators, and representatives chiefly concerned with foreign affairs. On the influence that an able and experienced chairman of a foreign relations committee may attain, see W. Lippmann, "Concerning Senator Borah," *Foreign Affairs*, IV, 211-222 (Jan., 1926).

³ B. Bolles, "Congress and Foreign Policy," *Foreign Policy Reports*, XX, No. 21 (Jan. 15, 1945).

In the period from Theodore Roosevelt to Woodrow Wilson, the president held the whip-hand in this domain. Reaction against Wilsonian diplomacy left Presidents Harding, Coolidge, and Hoover in a weakened position. Under Franklin D. Roosevelt, however, international tension and world-wide war, with steadily increasing involvement of the United States, brought the president back into a position of leadership and control equaling, if not surpassing, that which Wilson enjoyed.

finds basic acceptance . . . by the people of this country." Here, as in other areas of planning and action, the chief executive must ascertain, scrutinize, and weigh public opinion; failing to do so, he may easily be betrayed into embarking upon a line of policy leading straight to humiliating frustration at the hands of the people or their elected representatives. Not infrequently, cross-currents of opinion make it difficult to discern what the nation really thinks and wants with respect to a given situation or problem; considerations of self-interest and of altruism are often bewilderingly intermingled, and economic, ethnic, or other pressure groups may pull in diametrically opposite directions.¹ But there are ways—in which the president, the State Department, and Congress alike are usually versed—of forming reasonably sure judgments as to how far the country as a whole is prepared to go in supporting a given line of policy or its opposite; and most of the time, planning and action are kept within the limits disclosed.²

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¹ As illustrated in the critical years 1940-41 by the propaganda of the [William Allen White] Committee to Defend America by Aiding the Allies, on the one hand, and of the America First Committee and the No Foreign War Committee on the other.

² This, of course, does not debar either the Administration or Congress from trying to convert the nation to a particular line of policy, as, for example, President Wilson sought to win it to the plan for a League of Nations. On the rôle of public opinion in our foreign relations, see J. M. Mathews, *American Foreign Relations; Conduct and Policies* (rev. ed.), Chap. XIII; V. M. Dean, "U. S. Foreign Policy and the Voter," *Foreign Policy Reports*, XX, No. 13 (Sept. 15, 1944); K. Colegrove, "The Rôle of Congress and Public Opinion in Formulating Foreign Policy," *Amer. Polit. Sci. Rev.*, XXXVIII, 956-969 (Oct., 1944); and W. Johnson, *The Battle Against Isolation* (Chicago, 1944).

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CHAPTER XXXIV

NATIONAL DEFENSE—POWERS AND RESPONSIBILITIES

Nature has been generous to the United States, not only in endowing the country with a temperate climate, a generally adequate rain-fall, a magnificent river system, millions of acres of fertile soil, and abundant mineral resources, but in placing it between two great oceans which until of late seemed to isolate it safely from European and Far Eastern theaters of perennial international conflict. To the south lie a score of Latin-American republics, with which our relations have not always been all that could be desired, but which in any event have never offered any serious threat of invasion or conquest. On the north is the Dominion of Canada, belonging like ourselves to the English-speaking world, deeply conscious of its cultural kinship with us, and so good a neighbor that for more than a hundred years not a fort or a soldier has been required for the protection of the 3,500-mile common boundary. Of course this highly favorable situation never relieved us completely from the need for making some provision for national defense. After all, in but little over a hundred years we engaged in four international wars, including, in 1917-18, the greatest armed conflict that the world had known to that time. Hardly more than a decade ago, however, we still had a comfortable feeling of security. Our Army was small; our Navy, more impressive, yet not preëminent; the tone and temper of the national life not only precluded any suggestion of militarism, but made it difficult to maintain respectable defenses at all. If reassurance was needed, it could be derived from a five-power treaty of 1922¹ restricting naval armaments, and from the Briand-Kellogg Pact of 1929, subscribed to by practically all nations and outlawing war as an instrument of national policy.

Defense
long
regarded
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As time passed, however, it became apparent that we were living amid steadily increasing international dangers. Even if all governments and peoples were disposed to be bound by their pledges, none was precluded, by the Pact or otherwise, from fighting in self-defense; and it is notorious that any nation can make out almost any war to be one of that variety. But developments showed that various states and their rulers were not of a mind to be bound by their pledges: in 1931, Japan embarked upon a program of aggression and conquest in China, leaving the two countries locked to this day in mortal combat; in 1935, Italy took the offensive against helpless Ethiopia; after 1933, Hitler's rule in Germany was directed preëminently to building a war machine capa-

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¹ Concluded at the Washington Conference on the Limitation of Naval Armaments. See p. 678 below.

ble of bringing all Europe, and perhaps more, under the Nazi yoke. In 1936, all naval armament agreements collapsed; by that time, many nations were fast expanding their armies and air forces; and, already when, in 1935-37, the United States (still believing, or at least hoping, that she could keep aloof from conflicts beyond seas) enacted new and drastic neutrality legislation, surrendering our traditional doctrine of freedom of the seas as the price of security, war in Europe, in the opinion of most competent observers—and war on an even vaster scale than in 1914-18—was a future, and no very distant, certainty.

Early in the autumn of 1939, the gravest apprehensions were realized. Nazi forces invaded Poland; Great Britain and France declared war on Germany. In ensuing months, one European nation after another collapsed under the impact of Nazi arms; and almost before we were aware, the United States stood confronted with dangers against which no mere peaceful intent or policy of neutrality could be depended upon to afford protection. As never before in our history, defense became the country's paramount concern—defense, too, rendered immeasurably more complicated, difficult, and expensive by technological advances which in the meantime had caused the broad oceans bathing our shores to shrink, in effect, to mere fractions of their former width. With a stupendous program of defense preparations only half-way along, we were treacherously attacked, in 1941, by Japan, at once joined by Germany and Italy; and overnight our belated defense effort merged into the war effort of these later days. In the present chapter, we shall fix attention upon the more permanent constitutional and functional aspects of our defense system; in the one that follows, we shall be concerned, rather, with the military and civilian mobilization entailed by the present global conflict.

Two
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Defense
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During the Revolution and the ensuing "critical period," the lack of power of Congress to mobilize the fighting strength and material resources of the country, and to deal promptly and decisively with domestic disorders, gravely imperiled the birth of the nation, and the experience put the makers of the constitution in a frame of mind to endow the new government with adequate powers both to make war and to repress insurrection. Into the new fundamental law they therefore wrote upwards of a dozen provisions which, taken together, conferred upon the national government every power at that time deemed requisite for defending the country, whether against Indian depredations, foreign attack, or domestic uprising. Almost equally with the conduct of foreign relations, defense was made, as it today remains, a national function. To be sure, the states may maintain militia for use in enforcing their own proper authority. But unless Congress gives permission, they may not "keep troops or ships of war in time of peace" or engage in war unless actually invaded or in such imminent danger as will not admit of delay.¹ Even the state militia

¹ Art. I, § 10, cl. 2.

may be called into the service of the United States, thereupon passing under the supreme command of the president; and, as is well known, the military establishments of the states have in later times become an integral part of the war machine of the nation.¹ In time of defense emergency, and especially of war, states, counties, cities, and other jurisdictions collaborate with the national government in a multitude of ways. Their efforts, however, are merely phases of an over-all national effort; and full responsibility for that effort rests with the government at Washington.

A second matter is equally fundamental. While solicitous about providing for defense, the framers of the constitution had no desire to open a way for an overshadowing, and perhaps overweening, military establishment. To be sure, they did not expressly enjoin in the document—as is done in some of the state constitutions—that the military establishment shall in all matters be subject to civil control. But they accomplished the purpose adequately enough by so defining the defense powers of Congress and the president as to leave no room for military domination. As any one conversant with Washington affairs knows, Army and Navy officers, even in time of peace, exert a good deal of influence upon policies relating to national defense, upon military and naval appropriations, and at times even upon the conduct of foreign relations.² But in all such matters the power of final decision rests with civilians. Regardless of how vital, complicated, and even technical, the great questions of the present war became—whether to concentrate first on the European enemy, where to launch major offensives, how to distribute the fighting forces—they were in the last analysis settled, not by even the highest of military and naval authorities, but (with the advice, of course, of such authorities) by President Roosevelt (and his successor, President Truman) and Prime Minister Churchill.³

2. Civil authority supreme over military

Defense Powers and Functions of Congress

The supreme civil agencies sharing control over national defense are, of course, Congress and the president. To begin with, Congress has sole power to "raise and support armies" and to "provide and maintain a navy."⁴ These things it does by stipulating the number and kinds of troops to be enlisted, prescribing the method of recruitment, authorizing the building and manning of war-craft, providing for auxiliary equipment such as forts, arsenals, dockyards, and air services, and of course by raising and appropriating money for the maintenance of military, naval, and air establishments, subject to the constitutional restriction that no appropriation for raising and supporting armies may be made

1. Providing for the Army and Navy

¹ See p. 674 below.

² M. T. Reynolds, "The General Staff as a Propaganda Agency, 1908-14," *Public Opinion Quar.*, III, 391-408 (July, 1939).

³ Great Britain operates on the same principle of civilian control.

⁴ Art. I, § 8, cl. 11.

for a longer period than two years.¹ There is no lack of power to take whatever steps are deemed necessary—even to the extent of conscription, as in 1917 and since 1940—to safeguard the nation in time of peace and to insure vigorous and effective prosecution of hostilities in time of war.

3. Enact-
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tions

In the second place, Congress has full authority to prescribe "rules for the government and regulation of the land and naval forces,"² and "rules concerning captures on land and water."³ The resulting regulations for the Army are called the "Articles of War"; those for the Navy, the "Articles for the Government of the Navy"; together, the two are known as the "Military Laws of the United States." Within their proper spheres, both Army and Navy have "governments" of their own, with the military regulations prescribed by Congress as separate bodies of law, with hierarchies of military and naval officers to administer such law, with military police and courts-martial to aid in the enforcement of it, and with legal branches under judge advocates general, and likewise legal staffs attached to divisions and corps areas, to exercise functions of a judicial nature. The regulations imposed by Congress set forth the powers and duties of officers and men in the military and naval services, define offenses against discipline, provide means and procedures for trying persons accused of such offenses, fix penalties, and otherwise regulate military activities and conduct. While, however, civilians are not subject to military law, soldiers and sailors are by no means exempt from the ordinary law applying to civilians. Breaches of discipline and other minor offenses committed on military or naval reservations are dealt with only by the military or naval authorities. But a case involving serious crime, *e.g.*, murder, is likely to go to a civil court. Moreover, crimes committed outside military reservations may be handled by the military or on the other hand by civil authorities, and in peacetime an offender returning to the reservation where he belongs may be turned over to the proper civil court. In point of fact, almost any civil crime will be found to have been made a serious offense under military law also. Jurisdictional conflicts sometimes arise when state, rather than federal, laws are involved. But the principle is clear that state agents may not interfere with any action or procedure clearly authorized by federal law, military or civil.⁴

¹ Art. I, § 8, cl. 12. In this connection may be noted the power to purchase sites within the states, with consent of the legislature thereof, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings, and likewise that of exercising "exclusive legislation" over such "military reservations." Art. I, § 8, cl. 17.

² Art. I, § 8, cl. 14.

³ Art. I, § 8, cl. 11.

⁴ For a good brief discussion of military law and justice, see E. W. Puttkammer [ed.], *War and the Law* (Chicago, 1944). A useful source-book on the subject is A. A. Schiller, *Military Law and Defense Legislation* (St. Paul, Minn., 1941). Cf. L. G. Compton, "Khaki Justice; What Court Martial Means," *Atlantic Mo.*, CLXXIII, 47-52 (June, 1944); Major Gen. A. W. Gullion, "Courts Martial Today," *Amer. Bar Assoc. Jour.*, XXVII, 765-769 (Dec., 1941); Judge Advocate Gen. M. C.

Congress may provide for as large a professional or standing army as it sees fit. Although growing danger from abroad impelled it in 1940 to take steps looking to an armed establishment of two million men at a time when war was merely a possibility, our traditions, in common with those of English-speaking peoples everywhere, are opposed to the maintenance of a large standing army in time of peace, and by way of substitute we have stressed the organization and training of volunteer militia, now known as the National Guard.¹ The units composing this force belong primarily to the states, but with control vested also in the national government. Congress is expressly authorized to "provide for arming and disciplining the militia"; and it may provide for calling out the state units for three distinct purposes; namely, to execute national laws, to suppress insurrections, and to repel invasions.² Congress is empowered also to provide for governing such part of the militia as may be "employed in the service of the United States," although the appointment of militia officers and authority to train the militia in accordance with congressional regulations are expressly reserved to the states.³ In pursuance of its broad powers, Congress has enacted numerous laws aimed at increasing the effectiveness of the National Guard and co-ordinating its organization, training, and equipment with that of the Regular Army. It also makes liberal grants toward the cost of maintenance.⁴

3. Controlling the National Guard

Congress alone can declare war.⁵ Hostilities may, of course, begin without a formal declaration, as in the instance of the Spanish-American War of 1898; indeed, as in the case of the war with Japan, Germany, and Italy beginning in December, 1941, they may be forced upon us by aggressive action of a foreign power, leaving us no alternative. But even in such cases a declaration will promptly be adopted by the two houses, as a means (if for no other purpose) of fixing, for the benefit of neutrals,

4. Declaring war

Cramer, "Military Justice and Trial Procedure," *ibid.*, XXIX, 368-371 (July, 1943); *Harvard Law Rev.*, LVI, 631-642 (Jan., 1943), "Federal Military Commissions Procedure and 'Wartime Base' of Jurisdiction." *Military* law is not to be confused with *martial* law. The latter applies solely to civilians, or in any event to military personnel only incidentally. See p. 662, note 1, below.

¹ Speaking strictly, the militia includes, under terms of a statute of April 2, 1898, all able-bodied male citizens (and aliens who have declared their intention to be naturalized) between the ages of eighteen and forty-five; and all such are "liable to perform military duty in the service of the United States." (30 *U. S. Stat. at Large*, 361). In ordinary usage, however, the term has always been employed to denote only the armed establishments maintained by the states, i.e., the organized and trained portion of the militia now embraced in the National Guard. The world situation after the present war is almost certain to require the United States to maintain a considerably larger standing army than in the past. See pp. 682-684 below.

² Construed—as in 1940, when the entire National Guard was mobilized in the service of the United States—to include not only repelling invasion actually undertaken, but preparation to repel *threatened* invasion, or even attack without actual or probable invasion.

³ Art. I, § 8, cls. 15-16.

⁴ See pp. 673-674 below.

⁵ Art. I, § 8, cl. 11. This clause also grants authority to issue letters of marque and reprisal, which, however, has been of no practical importance since the disappearance of privateering.

an exact date from which the rights and liabilities incident to war are to be reckoned. The usual method is a joint resolution, requested and afterwards signed by the president.¹ Many times it has been proposed by people anxious to keep the United States out of war that, except when the nation is attacked, the question of going to war should in all cases be put to a country-wide popular vote. Unless the constitution were amended, however, the decision must finally rest with Congress; and it is not clear that a great deal would be gained from the procedure suggested. There would always be the question of the proper stage at which to resort to a referendum; and the people as a whole could not in all situations become sufficiently informed upon the complicated, and often technical, issues at stake to be able to act wisely.² As will be emphasized below, the discretion of Congress in the matter is sometimes more theoretical than actual, because the president, in conducting foreign relations, may bring the country to a point where no honorable alternative to war remains.³

There was a time when, except in case of invasion, war was of no very vital concern to the general mass of the people. Armies were volunteer,

¹ For the terse declarations of a state of war with Japan, Germany, and Italy, December 8 and 11, 1941 (*Public Laws*, 323, 331, and 332—77th Cong.), see *Amer. Jour. of Internat. Law*, XXXVI, Supp., pp. 2-3, 24 (Jan., 1942).

Whether the grant of authority to declare war carries with it, as a corollary, the right of Congress to declare the end of a war and the resumption of peaceful relations was warmly and exhaustively debated in the session of Congress held in 1920-21. Finally, more than two years after the signing of the armistice which marked the actual cessation of hostilities in 1918, a joint resolution was adopted in July, 1921, declaring the war with the Central European Powers at an end.

² With involvement in the steadily mounting European and Asiatic conflagration the uppermost national question in 1941, numerous polls conducted by the Institute of Public Opinion and by newspapers and other agencies undertook to test and measure public opinion on the issue. The results, of course, represented mere samplings, and not only were wholly unofficial, but in some instances worthless because of the slant given the questions asked. Some congressmen polled their constituents in an effort to ascertain their sentiments.

³ As these pages were written (April, 1945), a question of far greater practical importance was being posed. Broad plans for an international organization aimed at permanent preservation of peace were in the making, and leaders of the two major political parties seemed in agreement upon their major features, one of which was a "Security Council," as part of the new machinery, endowed with power to employ armed forces (furnished by the associated nations) to curb aggression or war-mongering in any part of the world. Should the president, acting independently, have power to commit the United States to such cooperative police action in any given situation? Or should he be required to obtain the consent of Congress before sending American forces into action? If the former, the power of Congress to "declare war" might be infringed; and congressmen were already voicing protest. If the latter, the chief executive might find himself unable to fulfill the country's obligations, and the peace machinery itself would certainly be weakened and perhaps wrecked. Congress might conceivably grant blanket authority to the United States representatives in the Council to commit us to the use of American forces in any situation arising. But it was by no means certain that such a grant could be carried in the two houses. The problem contained unfortunate possibilities of disaster for wholehearted American participation in the desired world organization. See W. R. Sharp, "American Foreign Relations Within an Organized World Framework," *Amer. Polit. Sci. Rev.*, XXXVIII, 931-944 (Oct., 1944).

The "Proposals for the Establishment of a General International Organization," formulated in international conversations at Dumbarton Oaks (Washington, D. C.) in Sept.-Oct., 1944, will be found in *Internat. Conciliation*, No. 405, pp. 730-743 (Nov., 1944); also in *U. S. News*, Oct. 20, 1944, pp. 29-33.

taxes indirect, supplies bought in the open market, sacrifice and morale demanded chiefly of the forces in the field. The huge scale on which the mechanized wars of today are waged, however, make them hardly less of civilian than of military concern. When war comes—and even when merely a threatened war is being prepared for—it is, as President Wilson remarked in 1917, “not an army that we must shape and train; it is a nation.” And experience gained both during the first World War and in connection with the stupendous defense effort launched in 1940, and merging into the war effort of these later days, has revealed in startling manner the lengths to which Congress may go in reorganizing and regimenting the national life for purposes of successful prosecution of, or even simply preparing for, war under twentieth-century conditions. As commander-in-chief of the armed forces, the president, as we shall see, independently enjoys war powers of impressive magnitude. To Congress, however, it falls, not only to provide the necessary men and money—by enlistment or conscription acts, revenue acts, and appropriation acts—but to endow the chief executive with much of the broad authority required for turning industry, commerce, transportation, and even science and education, into channels likely to contribute most adequately to successful national effort. The method is commonly that of legislation delegating specified powers for the duration of the war (or other stipulated period), either with or without creation by Congress of new machinery for exercising them. In each field covered, the resulting system of controls is elaborated and administered by the executive branch. But the underlying authority comes from Congress; and while the courts have often looked with extreme disfavor upon delegations of power by one branch of the government to another, developments during the first World War indicated that under wartime stress and excitement Congress can go practically as far as it likes in delegating authority to the president without fear of judicial impediments being imposed. Sometimes grants are made with little hesitation; at other times, only over strong opposition and at urgent presidential request. Occasionally, indeed, they are refused.

Except for providing that the writ of *habeas corpus* may be suspended “when in cases of rebellion or invasion the public safety may require it,”¹ the constitution recognizes no distinction between civil rights in peacetime and in wartime. During war, however, actual or alleged military necessity unfailingly gives rise to restrictions that would not be thought of or tolerated under other circumstances. To no small extent, indeed, such curtailments may actually flow from a tense and inflamed public opinion expressing itself in indiscriminating hostility toward groups or classes of people such as aliens, Communists, or supposed “fifth columnists.” However inspired, restrictions upon civil liberty in wartime may be imposed by the president (commonly through the agency of the De-

5. Providing for national mobilization

6. Regulating wartime civil rights

¹ Art. I, § 9, cl. 2.

partment of Justice), either under his powers as commander-in-chief or by virtue of authority delegated to him by Congress; or Congress itself may lay such restrictions directly by general legislative act. When, on account of war conditions or otherwise, the ordinary processes of justice prove inadequate in a given area, Congress may proclaim martial law therein;¹ although the president may do the same if Congress is not in a position to act. As already mentioned, the privilege of the writ of *habeas corpus* may be suspended. During the Civil War, President Lincoln took the position that the power of suspension belongs to the chief executive, and on a number of occasions he exercised it on his own authority. Congress, however, claimed the power for itself, and not only exercised it, but backed up its claim by passing acts of indemnity presumably validating the presidential suspensions; and from the fact that the power to suspend is included in a section of the constitution dealing principally with congressional powers, it is nowadays deduced that the contention of the legislative branch was probably correct.²

Congress, furthermore, may go to undefined lengths in restricting freedom of speech, press, assembly, and other activities or conduct in wartime. Thus an Espionage Act of 1917³ imposed heavy penalties for attempting to give any foreign nation information detrimental to the United States or seeking to stir up disloyalty, insubordination, or mutiny among soldiers or sailors of the United States; and a Sedition Act of 1918⁴ similarly penalized persons wilfully using "disloyal, profane, scurrilous, or abusive language" about the government or institutions of the country, advocating or inciting curtailment of the production of war materials, or by word or act favoring the cause of an enemy country. The latter of these drastic measures was repealed in 1921; but the former remained in suspended animation until we went to war again in 1941, when it was revived in full force. A new sedition act did not become necessary in 1941 only because the equivalent of such an act had been written into the Alien Registration Act of 1940.⁵ Legislation on this

¹ Martial law, it may be repeated, should not be confused with military law, which consists of rules and regulations applying only to persons in the military or naval service. Martial law (more often invoked by the states than by the national government) has the effect of subordinating civil to military authority in the area specified, and consists of no fixed body of principles and rules, but rather of whatever regulations those in command may see fit to impose. It applies to all civilians within the area, and sometimes to military personnel as well. See C. Fairman, *The Law of Martial Rule* (Chicago, 1930), and "The Law of Martial Rule and the National Emergency," *Harvard Law Rev.*, LV, 1253-1302 (June, 1942); E. Warren, "Wartime Martial Law in California," *Calif. State Bar Jour.*, XVII, 185-204 (July-Aug., 1942).

² E. S. Corwin, *The President: Office and Powers*, 176-189; S. G. Fisher, "Suspension of *Habeas Corpus* During the War of the Rebellion," *Polit. Sci. Quar.*, III, 454-488 (Sept., 1888); G. C. Sellery, *Lincoln's Suspension of Habeas Corpus as Viewed by Congress* (Madison, Wis., 1907); G. Anthony, "Martial Law, Military Government, and the Writ of *Habeas Corpus*," *Calif. Law Rev.*, XXXI, 477-514 (Dec., 1943).

³ 40 U. S. Stat. at Large, 217.

⁴ 40 U. S. Stat. at Large, 553.

⁵ See p. 124 above.

general subject is likely to be enacted only when the atmosphere is charged with fear and hate; and too often it has been couched in language so sweeping as to open the way for, if not actually to encourage, serious invasions of constitutional civil liberty by enforcing officers, and even by the courts.¹

Congress, of course, may at all times call for reports from departments or agencies of the government—even from the president himself; likewise it may conduct investigations whenever it likes. With powers concentrated extraordinarily in the executive branch under wartime conditions, reports on how powers are being exercised are likely to be asked for with unusual frequency, and also investigations to be more frequently undertaken. Reports are sometimes perfunctory, and rarely very productive. Investigations, however, are, at least potentially, an important means of exercising control; and of twenty or more ordered during the period 1940-42, and having to do with the defense effort or the management of wartime activities, several proved of genuine significance.² Speaking broadly, it is the function of Congress, in addition to providing the commander-in-chief with the powers and sinews of war, to supervise and review the conduct of war, without attempting to take part in managing it.

Not only has Congress always provided regular pay for the officers and privates in active service, but it has bestowed other rewards and aids upon the demobilized forces after every war in which the United States has been engaged, from the Revolution onwards. Surviving soldiers and sailors who have suffered disability, together with their dependents, are recognized as having an irrefutable claim to the nation's care; and pressure upon congressmen by veterans' organizations has often led to grants or benefits where the obligation was less clear. So generous, indeed, has been Congress when veterans have been involved that from 1792 to 1930 national outlays on money pensions alone reached a total of fifteen billion dollars; and this takes no account of allotments of land to veterans in earlier days, or of the heavy cost in later decades of hospitalization and medical treatment for veterans incapacitated by injuries or illness incurred in active duty.³ Other benefits nowadays freely bestowed by

7. Requiring reports and conducting investigations

8. Providing for veterans

¹ D. O. Walter, *American Government at War* (Chicago, 1942), Chap. vii; C. B. Swisher, "Civil Liberties in Wartime," *Polit. Sci. Quar.*, LV, 321-347 (Sept., 1940); R. E. Cushman, "National Defense and the Restriction of Civil Liberties," *Univ. of Kansas City Law Rev.*, IX, 63-76 (Feb., 1941).

² Among these were the investigation of un-American activities by the Dies Committee, of national defense migration by the Tolan Committee, and of national defense activities in general by the Truman Committee.

³ It has never been considered necessary or practicable to pension the whole number of men released from service at the close of a war. Those emerging able-bodied and with unimpaired earning power have normally been expected to take care of themselves, at all events for a time. Beyond this, three main principles or procedures have, in general, been followed: (1) Persons leaving the service with earning power destroyed or reduced by reason of injuries or sickness arising from military duties are pensioned at once, and likewise dependents of persons who have lost their lives. (2) As survivors dwindle in number and lose earning power with advancing age,

congressional act include (1) government aid in carrying protection originating in in-service, war-risk insurance, and (2) preferential eligibility for employment in the federal civil service.¹ After long controversy, too, honorably discharged veterans of World War I were, in 1924, granted a money bonus proportioned to their period of service. Needless to say, today's war, with almost three times as many Americans in uniform as in 1917-18, will present Congress and the country with pension, "bonus," and hospitalization problems transcending any heretofore known. With demobilization still remote, scores of bills relating to such matters made their appearance on Capitol Hill; and the year 1944 saw legislation enacted under which veterans were pledged monthly payments for a brief period after honorable discharge, and likewise were made beneficiaries of the so-called "GI Bill of Rights" opening opportunities for service men to gain hospitalization rights, acquire homes, purchase farms, start businesses, or obtain general education or professional training, with government aid in securing loans or with, for educational purposes, outright government subsidy.²

Defense Powers and Functions of the President

Sources
of power:

1. The
role of
com-
mand-
in-chief

The central figure in national defense, including the conduct of war, is, of course, the president; and he becomes such by reason of powers and functions derived from two main sources, over and above his basic position as chief executive: (1) his constitutional rôle as commander-in-chief,³ and (2) special grants of authority by Congress. As chief executive, the president might be regarded as having, in any case, the power to appoint (with confirmation by the Senate) all regular and reserve officers of the Army and Navy,⁴ to supervise and direct the War and Navy Departments, and to enforce military and naval regulations made

many are pensioned regardless of the fact that their disability may not be traceable to military service. (3) After the number of survivors has fallen to relatively small proportions, pensions are granted to substantially all, as likewise to widows and other classes of dependents. See *Federal Laws Relating to Veterans of Foreign Wars of the United States*, 72nd Cong., 1st Sess., Sen. Doc. No. 131 (1932).

For purposes of more unified and effective administration, a Bureau of Pensions long maintained in the Department of the Interior was in 1930 consolidated by executive order with other scattered agencies having to do with military pensions and veterans' relief to form an independent establishment known as the Veterans Administration, which forthwith became one of the most heavily manned branches of the government, and also one of those requiring the largest yearly appropriations. As a result of the present war, the Veterans Administration already has been given enlarged functions, and in future years it will be a huge establishment indeed. Civil pensions, it may be noted, are administered by the Civil Service Commission.

¹ See pp. 435-436 above.

² Service-men's Readjustment Act, *Public Law 346*, 78th Cong., 2nd Sess. (approved June 22, 1944). The basis for this legislation was supplied by a report of the National Resources Planning Board in 1943 entitled *Demobilization and Readjustment; Report of the Conferences on Postwar Readjustment of Civilian and Military Personnel*. On "Veterans in Postwar," see series of articles in *State Government*, XVII, 455-472 (Dec., 1944).

³ Art. II, § 2, cl. 1.

⁴ The officers of the National Guard, except when in the service of the United States, are appointed as the several states direct.

by Congress, supplementing them with others issued on his own authority. The additional rôle of commander-in-chief, however, not only reinforces powers such as these, but carries with it greater ones that otherwise might not be deemed to be possessed. Precisely what it means to be commander-in-chief, the constitution does not undertake to say; and neither Congress nor any court has ever sought to define the term. Usage, however, especially during our major wars, has made fairly clear the range of powers and functions involved—even though ever-widening interpretations under stress of war (notably at the hands of President Roosevelt and his legal advisers down to 1945) provoke plenty of challenges and leave a fringe of uncertainty as to what new reaches of authority might yet be read into the title.¹ This is, indeed, a major point at which confusion and competition between the executive and legislative branches arise.

In general, Congress provides the money and the men; the president, as commander-in-chief, uses them practically at his discretion. Congress, however, not only provides money and men; it also confers powers. And, ostensibly at least, the powers delegated add to those enjoyed as commander-in-chief. In many cases, they undoubtedly do this; although persons taking a very broad view of what is comprehended in the function of commander-in-chief may regard such grants as superfluous, and even restrictive. In the opinion of former Secretary of War, Newton D. Baker, for example, laws passed by Congress in 1917 in anticipation of war "hampered more than helped the prosecution of the [first] World War,"² the thought behind the observation being that from the function of commander-in-chief can readily and properly be deduced complete authority to prosecute a war to the fullest extent, and that acts of Congress undertaking to implement such authority are likely to have the effect—by process of definition—of narrowing it rather than otherwise. But in any event the president's war powers at any given time certainly comprise those possessed as commander-in-chief, as supplemented, modified, and perchance at some points curtailed, by pertinent acts of Congress.³

2. Grants
by Con-
gress

Congress alone can declare war. The force of the statement is lessened, however, by the fact already noted that in conducting the country's

¹ The constitutionality of President Roosevelt's orders as commander-in-chief under which some 110,000 Japanese residents of the Pacific Coast—citizen and non-citizen alike—were removed to interior relocation centers in 1942 was naturally called in question. In the case of *Korematsu v. United States* in 1943, the evacuation was held by a federal circuit court to have been constitutional; in that of *Hirabayashi v. United States* (320 U. S. 81), in the same year, the Supreme Court, without passing upon the main question, indicated that it would be likely to take a similar position on the right to remove the Japanese, but probably would deny any right to detain in relocation centers American citizens against whom, as individuals, no charges of disloyalty had been filed; and when the *Korematsu* case was appealed, the Court, in 1944 (dividing six to three), took the anticipated position on both points. *Korematsu v. United States* (65 Sup. Ct. Rep. 193).

² Quoted in E. S. Corwin, *The President: Office and Powers*, 395.

³ For a digest of provisions delegating discretionary powers to the president in relation to the present war situation, see L. W. Koenig, *The Presidency and the Crisis* (New York, 1944), Appendices A and B.

Relation
to the
beginning
of war

foreign relations the president may virtually make war inevitable. As commander-in-chief, President Polk, in 1846, ordered American troops to advance into territory then in dispute with Mexico. The Mexican authorities had made it plain that they would consider such a step an act of war, and the soldiers were promptly fired upon. Polk thereupon said that war existed by act of Mexico, and Congress proceeded to a formal declaration. President McKinley ordered the battleship *Maine* to Havana harbor in 1898, notwithstanding that the Spaniards were certain to regard the act as unfriendly. The vessel was blown up, and the Spanish-American War followed. There will always be difference of opinion as to whether we were or were not at war with Mexico on the occasion of Admiral Mayo's capture of Vera Cruz by order of President Wilson in 1913, and with Russia when—again on the president's sole authority—American troops coöperated in military expeditions against the Bolsheviks *via* Archangel and Vladivostok in 1918. By his handling of relations with Berlin after the sinking of the *Lusitania* in 1915, President Wilson created a situation in which the only alternative to a declaration of war upon Germany would have been national stultification. And, more recently, the whole course of policy and action which over a period of years led the United States straight to involvement in the second World War, while given increasing evidences of national support; was projected and carried forward under the sole ultimate responsibility of President Franklin D. Roosevelt.¹

Extraor-
dinary
powers
during
war

In time of peace, the president is likely to function as commander-in-chief in rather a routine manner; there may be little occasion for him to do otherwise.² In time of war, however, the situation is different; then the power of command attains its full potentialities, finding applications that would never be tolerated, or even thought of, save in a national emergency. Even in time of peace, and limited only by the funds at his disposal, the president can send both land and naval forces anywhere that he chooses, in this country or abroad; and naturally in time of war there is no limitation upon such authority.³ With war in progress, the

¹ S. E. Baldwin, "The Share of the President of the United States in a Declaration of War," *Amer. Jour. of Internat. Law*, XII, 1-14 (Jan., 1918).

Over against the president's capacity for "rushing" Congress and the country into war must, however, be set his power to veto a declaration of war; although this power has never been, and is not likely to be, exercised.

² This, of course, was far from true during the year or two preceding the outbreak of the present war. With the nation actively pushing its defense program, President Roosevelt, in this period, took many unusual steps as commander-in-chief, such as sending military observers to European countries; dispatching armed forces to Ireland, British Guiana, and Surinam, leasing naval and air bases from Great Britain, and ordering "lend-lease" cargoes convoyed by the American Navy.

³ Under the defense program launched in 1940, the National Guard, together with troops raised under the Selective Training and Service Act of 1940 (see p. 674 below), might be used only in the Western Hemisphere and in United States territories and possessions, including the Philippines. Upon the outbreak of war with the Axis Powers in December, 1941, however, the restriction was removed and the way opened for sending any of the country's armed forces to any part of the globe. There is reason to think that Congress properly lacked power to impose the restriction mentioned in the case of drafted men. See judicial decision cited below (p. 669, note 1).

chief executive can take as much part as he likes in formulating strategy and carrying on campaigns; indeed, there is nothing to prevent him from taking the field in person if he so desires, except, of course, that, as a civilian, he would be an amateur—even if he were not pressed to the limit with tasks more properly within his province.¹ He can establish military governments in conquered territory, and directly or through his appointed agents exercise all executive power there, and all legislative power as well until Congress makes different arrangements.² Like any other supreme commander, he can terminate hostilities by agreeing to terms of armistice. Meanwhile, he can take over plants in which labor stoppages are interfering with war production, or the railroads if transportation difficulties are impeding the war effort. Indeed, the object in war being to mobilize and make effective the national strength as speedily as possible, and at the same time to break down the enemy's power of resistance, control over the disposition of the armed forces inevitably broadens into the general duty of taking whatever measures may be found necessary to the ends mentioned. In all this, the president, of course, must not violate the constitution or laws; and, to a degree, he must work in coöperation with Congress.³ Outside of these limitations, however, he and his advisers, civil and military, have a free hand. By its very nature, running a war is an executive job; it cannot be intrusted to a debating society.

At a number of points, the president's war powers in the present conflict have reached levels never before attained. During the Civil War, however, they vaulted to heights at that time unprecedented; and the experi-

¹ More than most presidents in wartime, President Roosevelt shared, and even led, in the planning of military and naval strategy and operations during the present global war. In the summer of 1942, there was some complaint that he and Prime Minister Churchill were trying to exercise too much personal direction. Later developments showed that United Nations strategy was moving on intelligent and fruitful lines, and the critics were largely silenced. In a "fireside chat" of October 12, the President freely conceded the wisdom of leaving military decisions to military men. This was not meant to imply, however, any relinquishment of his own *ultimate power* to make them, in so far as he chose; and the generalization expressed above still holds true.

² D. Y. Thomas, "History of Military Government in the Newly Acquired Territory of the United States," *Columbia Univ. Studies in Hist., Econ., and Public Law*, XX, No. 2 (1904); R. H. Gabriel, "American Experience with Military Government," *Amer. Polit. Sci. Rev.*, XXXVII, 417-438 (June, 1943). Puerto Rico was governed solely under presidential authority from 1898 to 1900 and the Philippines from 1898 to 1902.

³ Many times the question will arise whether a proposed line of action can be taken without authorization by law. In such a situation, the president is likely to be guided by opinions received from the attorney-general—who, being a member of the Administration, is apt to lean toward strong presidential powers. In August, 1942, President Roosevelt sought in this way the opinion of Department of Justice officials as to whether he might not, without waiting for congressional action, institute a system of drastic wage and farm-price controls. The contemplated action was the more extraordinary in that it could not be taken without suspending the operation of a statutory provision forbidding farm-price ceilings to be established below 110 per cent of so-called "parity," based on the exceptionally high levels of 1909-14. The opinions received were in the affirmative; although the threat of independent executive action was removed by new farm-price legislation soon grudgingly enacted by Congress.

Illustrations
from the
Civil War
and
World
War I

ence was repeated after we entered the first World War in 1917. In addition to active direction of operations on land and sea, President Lincoln authorized searches and arrests without warrants, caused newspapers to be suppressed, declared martial law even in regions where the regular courts were open, suspended the writ of *habeas corpus*, and in other ways sought to suppress opposition to the policies of the government from persons in the North who sympathized with the Southern cause. With a view, also, to lessening the South's power of resistance, he issued the famous proclamation of 1863 liberating the slaves in enemy areas. Most of these acts were performed on his own initiative and responsibility, often with Congress not in session, and in any event with congressional approval sought only afterwards. In the majority of instances, the necessary validation was forthcoming, but not in all; and a few of the things done were judicially held to have been unconstitutional.¹

During the first World War, President Wilson wielded even greater power, but with the difference that he habitually sought and obtained from Congress advance grants of authority deemed necessary for the successful prosecution of hostilities. Thus, a month before war was declared, he got authority to compel manufacturers to give priority to government orders for war materials, and to commandeer factories for operation by the government. A Food and Fuel Control Act of 1917 authorized him to regulate by license the importation, manufacture, storage, and distribution of necessities, to requisition foods and fuels, to take over and operate mines, pipe-lines, packing houses, and other establishments, to prohibit the use of grains in the production of alcoholic beverages, and to regulate prices of wheat, coal, and coke. A Selective Service Act of the same year gave him authority to draft into potential war service substantially the entire manhood of the nation between the ages of eighteen and forty-five. Other acts gave him authority to place an embargo on certain exports; to censor all communications with foreign countries by mail, cable, radio, or otherwise; to take over and operate rail and water transportation facilities of the country, as also the telegraph and telephone systems; and in the Overman Act of 1918 he received authorization, for the duration of the war and for six months thereafter, to carry out any transfer or consolidation of bureaus and offices of the government deemed advantageous for prosecution of the war. From the powers conferred arose a swarm of new executive agencies, sometimes created expressly by the relevant legislation, more often established by order of the president; and

¹ For example, in *Ex parte Milligan*, 4 Wallace 2 (1886). The point should be emphasized that there was no attempt to suppress everybody who disagreed with Lincoln and his policies, but only those persons who were considered to be actually endangering the success of Union arms. The outstanding fact in the entire experience is not the occasional infraction of clauses of the constitution, but the general recognition that things *ought* to be done according to law and by constitutional procedures. Under the circumstances, it would have been extremely easy to surrender to the principle *inter arma silent leges*. On Lincoln's use of war powers, see E. S. Corwin, *The President: Office and Powers*, 155-189, and especially the writings of J. G. Randall cited on p. 671 below.

from the new executive agencies, in turn, flowed masses of administrative regulations dwarfing the statutes on which they were grounded, and truly appalling to the inquirer who would learn in detail how the war effort was actually carried on.¹

The war powers of the president in the current war period fall into several categories. First of all, they include, of course, the extensive powers which he at all times possesses, by constitutional right, as commander-in-chief. In the second place, he has carried over, especially from World War I, large emergency powers delegated to him by Congress and never taken away. Among these are power to increase the authorized strength of the Army and Navy (within limits prevailing before 1940), to suspend or amend the rules governing the transmission of communications by radio or wire, and authority to take over power-houses, dams, conduits, and reservoirs needed in manufacturing military munitions; indeed, in 1939 a list of such delegations extended to over one hundred. Thirdly, numerous and drastic powers were conferred in various statutes enacted in 1940-41 in pursuance of the defense effort of that period. In this connection, one recalls the Selective Training and Service Act of 1940, conferring power to select and induct into service as many eligible men as in the president's judgment the national interest required; the Lend-Lease Act of 1941 authorizing the president, acting independently and with the aid of funds furnished by Congress, to sell, transfer, exchange, lend, or lease ships, aircraft, implements of war, or other materials to the government of any country whose defense was deemed vital to the defense of the United States; and other acts giving the chief executive power to prohibit the export of military equipment, to establish priorities on materials used in naval construction, to acquire stocks of strategic and critical materials needed by defense industries, to requisition property required for defense, and to arm merchant ships.

Extensive as were the powers thus possessed when war began, Congress, within eleven days after the attack at Pearl Harbor, passed the First War Powers Act, reviving and extending special powers earlier granted to President Wilson, including power (1) to establish a censorship over all communications by mail, cable, radio, or other means passing between the United States and any country the president should specify, (2) to transfer functions—if related to the conduct of war—from

¹ The high-lights of these developments are well brought out in E. P. Herring, *The Impact of War* (New York, 1941), Chap. vii, and C. B. Swisher, "The Control of War Preparation in the United States," *Amer. Polit. Sci. Rev.*, XXXIV, 1085-1103 (Dec., 1940). Cf. F. L. Paxson, *America at War, 1917-1918* (Boston, 1939); W. F. Willoughby, *Government Organization in Wartime and After* (New York, 1919); B. Baruch, *American Industry in the War; A Report of the War Industries Board* (Washington, 1921).

On this occasion, the presidential power chiefly challenged in the courts was that of sending troops abroad before the country was invaded by a foe. In the Selective Draft Law Cases, 245 U. S. 366, 369 (1918), the Supreme Court fully sustained this power, making it clear that in his capacity as commander-in-chief the president may (in the absence of restrictions imposed by Congress) dispatch forces to any part of the world in which he considers that their services are needed.

one government agency to another, (3) to modify defense contracts and permit them to be entered into without competitive bidding, and (4) to control alien financial transactions and to utilize in the national interest approximately seven billion dollars' worth of alien property in the United States.¹ Three months later, an amending Second War Powers Act (1) broadened the power to requisition machinery, tools, and materials for war production, and (2) conferred power to extend priorities to tools and machines as well as to materials, to penalize priorities violations, and to regulate motor and water carriers in the same way as railroads.² Other special powers, of varying range and diversity, were conferred in later acts, although sometimes only over a good deal of opposition. It is hardly necessary to add that the special powers thus granted the chief executive have been exercised by him either through existing agencies or through new ones created by statute or by executive order;³ also that they commonly have not been granted indefinitely as to duration, but for fixed periods only.⁴

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 C. A. Berdahl, "War Powers of the Executive in the United States," *Univ. of Ill. Studies in the Social Sciences*, IX, Nos. 1-2 (Urbana, 1921).

¹ 55 U. S. Stat. at Large, 838.

² 56 U. S. Stat. at Large, 176.

³ Some of these will be described in the following chapter.

⁴ The First War Powers Act, for example, expires six months after the end of the war; the Second was originally to terminate December 31, 1944, but was extended further. With a view to being able to recall any of the powers delegated irrespective of presidential desire, Congress incorporated in both of these measures (and in certain others, including the Lend-Lease Act) provision for withdrawal or cancellation by *concurrent resolution*—the point being that, while bills and joint resolutions must be submitted to the chief executive, concurrent resolutions have not been so submitted since the earliest days of the Republic. The reason for the exemption is that, as the House *Manual* explains, concurrent resolutions have long confined themselves to expressing "facts, principles, opinions, and purposes of the two houses," without embodying any actual "propositions of legislation"—which, if such were included, would presumably make submission to the president necessary. The clauses in the war legislation referred to, however, contemplate actions that would seem to be tantamount to legislation; and there has been much difference of opinion as to whether the asserted power of recall could validly be exercised in the manner contemplated. There has as yet been no test of the matter. See H. White, "The Concurrent Resolution in Congress," *Amer. Polit. Sci. Rev.*, XXXV, 886-889 (Oct., 1941), and "Executive Responsibility to Congress via Concurrent Resolution," *ibid.*, XXXVI, 895-900 (Oct., 1942).

The best general accounts of the president's war powers will be found in the books by C. A. Berdahl and H. White listed under "References," and perhaps the best brief account is E. P. Herring, *The Impact of War*, Chap. vi. Cf. L. W. Koenig, *The Presidency and the Crisis* (New York, 1944), Chap. III.

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CHAPTER XXXV

WARTIME MILITARY AND CIVILIAN MOBILIZATION

The sudden rise of a great emergency

In May, 1940, the United States embarked upon as formidable a task as any in its history. Only twenty-two years after the war that was to have ended all wars, a new World War, precipitated by totalitarian dictatorship, was deluging Europe and Eastern Asia with blood and threatening to sweep across seas to the Western Hemisphere as well. Poland, Denmark, Norway, Belgium, the Netherlands, had yielded to Nazi assault; France was fighting on two fronts, but manifestly about to go down; Great Britain was fortifying against imminent invasion; throughout a war-torn continent, the impossible was daily becoming history. From a boredom inspired by a European conflict which in its earlier stages had seemed only a *Sitzkrieg*, Americans were suddenly stirred to alarm, becoming almost over night more war-conscious than at any time since 1918. People who had naively supposed that the country could maintain the even tenor of its way in a world aflame perceived, if they did not openly acknowledge, their error; and although wide differences of view prevailed on the degree to which our government and people should countenance the idea of ourselves becoming involved, few could deny that, with the ambitions and purposes of Hitler and the Japanese war-lords what they were, we easily might come into a situation (as we eventually did) in which we would have no choice, at all events if we did not immediately arm against any eventuality.

Our defense situation at the time

We had, of course, something to start with. There was a small peacetime army. There was a navy of respectable proportions when massed in either the Atlantic or the Pacific, although not very formidable when divided. Both army and navy had modest auxiliary air forces, and certain trained reserves. Army and navy appropriations had increased appreciably in recent years; indeed, in each fiscal year beginning with 1937 a new peacetime high had been attained. Still on the statute-book, furthermore, was a section of the National Defense Act of 1916 authorizing the president, when need should arise, to set up a Council of National Defense, consisting of the secretaries of war, navy, interior, agriculture, commerce, and labor (therefore virtually a committee of the cabinet), and to provide it with advisers qualified in various fields of defense activity; also the National Defense Act of 1920 making further provision for industrial mobilization in time of emergency. For years an Army-Navy Munitions Board had been developing an industrial mobilization plan designed to be put into immediate effect if and when "M-Day," i.e., Mobilization Day, should arrive, and providing not only

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for the requirements to be made of industry and the measures to be taken to meet them, but also, to a considerable extent, for the controls and managements requisite to insure that such measures would be carried out.¹ And Reorganization Plan No. 1 of 1939 had made paper provision for an Office of Emergency Management in the newly established Executive Office of the President, designed for the coördination of special civilian agencies such as war inevitably would require. The president had no power to make war independently. But in one way or another he had come into possession of enough emergency authority to enable him to go far toward calling into being the necessary civilian machinery of wartime; and in point of fact the machinery of the kind created after 1940 was in the main built up, piece by piece, by executive order.

The Defense Services as Developed Since 1940—The Army

Free from dangerous neighbors on her borders, and far removed from the scenes of Old World conflict (until technological developments brought them near), the United States has traditionally maintained only a small standing army.² Active entrance into world politics in the period of the Spanish-American War led to some lasting increase of the forces; but even in 1914 the authorized strength of the Regular Army was only 98,000 officers and men, and the actual enlisted strength considerably less. Emergency effort during the first World War brought under arms a total of more than three and one-half millions. But on June 30, 1939, the effective strength of the Regular Army stood at only 13,814 officers and 174,079 enlisted men—a total of 187,893. Until 1940, the force was in peace times recruited entirely from volunteers, serving for one year or three years at their option (with reënlistment for periods of three years), and officered mainly by graduates of the United States Military Academy at West Point.³

The Regular Army to 1940

Under the Army Organization Act of June 4, 1920, the effective military forces of the United States—constituting the "Army" in the broader sense—were defined as including not only the Regular Army, but in addition (1) the organized militia of the states, territories, and District of Columbia (given the new name four years previously of "National

National Guard and Organized Reserves

¹ In point of fact, however, this plan, conceived essentially in terms of 1917-18 conditions, proved completely inadequate in the new situation and was never put into operation.

² On the Army as it stood in 1940, see D. H. Popper, "The U. S. Army in Transition," *Foreign Policy Reports*, XVI, No. 18 (Dec. 1, 1940); H. S. Ford, *What the Citizen Should Know About the Army* (New York, 1941); and especially E. P. Herring, *The Impact of War*, Chap. III, on "The Place of the Army in National Life."

³ Under a system whereby most of the 1,964 cadets then enrolled in the Military Academy (and also of the 2,400 enrolled in the Naval Academy at Annapolis) were chosen, in effect, by senators and representatives from their states and districts, wide geographical, social, and racial distribution being thereby secured and the rise of a military caste averted. The system remains the same today, but with wartime numbers considerably increased. For more advanced officer training, the government maintains an Army War College at Washington, D. C., and a Naval War College at Newport, R. I.

Guard"), and (2) the Organized Reserves; and this is still officially the situation. Consisting, in each territorial unit, of volunteers enlisted for three years, the National Guard was normally under locally appointed officers. But, under a grant-in-aid system, most of its cost was borne by the national government; national standards were prescribed and enforced; and part or all of it was liable to be called at any time into national service (under nationally appointed officers)—as the whole of it actually was when our defense preparations started in 1940. Once the present war is over, the Guard will presumably revert to its former position.

During the first World War, one of our greatest obstacles to building a large and efficient army was the lack of trained officers, and plans were quickly put into operation under which from that time forth college students, after instruction in Reserve Officers Training Corps ("R.O.T.C.") units and summer camps, received commissions as second lieutenants, or even by correspondence courses and examinations made themselves eligible for various Reserve appointments. In these and other ways, a skeleton organization was built up, composed of persons normally engaged in civilian pursuits, but ready to be mobilized for officer service in time of need; and the reservoir of officer material thus created (some 75,000 men late in 1941) proved invaluable in getting the training of a greater army under way in 1940.

Adoption
of selec-
tive com-
pulsory
military
service in
1940

Preparation of the country to meet the dangers looming large in 1940-41 involved two main lines of activity: (1) increasing the active military and naval forces and giving them the necessary training, and (2) mobilizing the nation's industrial and other resources for support of the new defense program and for effective coöperation if and when war should come. The earliest moves made in the first direction were to add to the authorized enlisted strength of the Regular Army, the National Guard, and the other armed forces, to launch intensive campaigns for recruiting volunteers, and eventually to call the National Guard and Organized Reserves in all of the states (by that time totalling 408,000 officers and men) into federal service, and to put them in special training in cantonments. All this, however, was only preliminary to a far more drastic step, i.e., the first peacetime resort to selective compulsory military service in the country's history. On September 13, 1940, the president approved a Selective Training and Service Act¹ (effective until May 15, 1945), under which all male citizens and resident male aliens between the ages of twenty-one and thirty-five inclusive were required to present themselves for registration, becoming thereupon (except as otherwise provided in the law) liable, as soon as called, to training and service in the land or naval forces of the nation for twelve consecutive months, and retaining

¹ 54 *U. S. Stat. at Large*, 835. As these pages went to press (May, 1945), Congress was engaged in passing a "draft-extension" bill, prolonging the Selective Service Act of 1940 to May 15, 1946, or to the end of the existing war, whichever should come first.

a reserve status for ten years after the period of training. Fixing the number to be selected and trained each year during the specified period at approximately 900,000, the act contemplated an ultimate trained reserve substantially as large as the total force called into service during the first World War, *i.e.*, somewhat over three and one-half millions.

Under a clause extending such opportunity, thousands of young men anticipated the draft by voluntary enlistment. But on October 16, 1940, almost sixteen and one-half million others were registered throughout the country, under supervision from Washington, though locally in each state through civilian machinery set up by the governor thereof. Within two weeks, master numbers were drawn by lot in Washington to determine the order in which the registrants should be called; immediately thereafter the work of classification and selection was begun, through county boards (district boards in larger cities) with power to decide cases of deferment; and by midsummer of 1941 a total of approximately 600,000 "selectees" were in camp.¹ Pressure for relief of persons of greater maturity and more established position led at that point to blanket deferment of some eight million selectees of the age of twenty-eight and over. But at the same time all young men who, by July 1, had reached the age of twenty-one since the registration of the previous autumn were added to the list; and later in the year, after vigorous controversy stirred by assertion of the president and military authorities that the growing national danger made it unwise to release selectees at the end of their twelve months, the period of service which the president was authorized to exact was extended for all by a year and a half. Effort, however, was made to soften the impact of this extension upon persons actually called into training by guarantees in the law (1) that if public employees, they would be regarded as merely on leave of absence and, upon honorable discharge, would be restored to their former status and pay, and (2) that if in private employment, they would have the same right unless the employer's circumstances had so changed in the meantime as to make such restoration "impossible or unreasonable."²

The country had previously experienced two "drafts" in *wartime*,

¹ In August, 1941, the restriction to 900,000 at a time was repealed. As finally developed, the machinery for operating the selective system consists chiefly of: (1) an independent establishment, the Selective Service System, responsible directly to the president; (2) the governor of each state, working through a state director of selective service; (3) unpaid local (county or district) boards, which keep the lists and manage the actual work of selection within their jurisdictions; and (4) a variety of appeal boards, medical advisory boards, and the like.

² A detailed account of the workings of the system will be found in W. D. Boutwell *et al.*, *America Prepares for Tomorrow*, Chap. xix. Cf. R. D. Gibbons, "The Selective Service Acts of 1917 and 1940," *Geo. Washington Law Rev.*, IX, 687-693 (Apr., 1941). Cf. E. Crowder, *The Spirit of the Selective Service* (New York, 1920).

Only about one-fourth of the million men released from service to April, 1944, and returned to civilian life wanted their old jobs back. Many had acquired new skills and wanted better jobs. To be eligible for his old job (or a similar one), a veteran must apply for it within forty days after his discharge from the service and prove himself still qualified for it. Moreover, if it is in a plant having a closed-shop agreement, he will have to join the union if he does not already belong.

What time
broaden-
ing of
the draft

i.e., under acts of 1863 and 1917. It was now destined to a third; for after the selective training and service program launched in 1940 had been in operation less than a year and a half, war became a reality. Within two weeks after the Japanese attack at Pearl Harbor, Congress passed and the president approved a measure requiring all men between the ages of eighteen and sixty-four inclusive (except those already registered) to register for conscription in the armed forces or for non-combatant war activities, at the same time fixing the age limits for liability for military service at twenty to forty-four inclusive.¹ In pursuance of this act, approximately nine million previously unregistered men of the ages for active military service were added, on February 16, 1942, to the more than seventeen millions already on the rolls; and later, on April 27, a registration of men between forty-five and sixty-four brought on the non-combatant rolls a total of some thirteen millions. On the ensuing June 30 were registered all male youth born between January 1, 1922, and June 30, 1924; and of the approximately three millions thus reached, about one-fifth became immediately liable to call for service.² Finally, on November 13, 1942, the President approved an act under which youths of eighteen and nineteen (potentially, some two millions—in addition to the half a million already under arms) were made actually as well as potentially liable to draft; and in 1943-44 large numbers of these were put in training and sent into active service. Meanwhile, legislation had been approved removing all restrictions on the use of the armed forces anywhere in the world, and also extending the period of service of all military personnel (within the 1945 limit) until six months after the end of the war, unless sooner terminated by presidential order, or, of course, individually discharged. Until December 5, 1942, only the Army drew upon the selective service lists. But under an executive order of that date the Navy, Marine Corps, and Coast Guard, hitherto relying on volunteers, were authorized to recruit from the same source.

The war-
time
Army

In no previous war did the United States take on military and naval obligations (to say nothing of obligations of other kinds) commensurate with those assumed in the present one. This has been a *World War* in a new and literal sense; before the country had been a belligerent six months, its forces were operating in more than thirty distinct areas, in nearly all quarters of the globe. By the autumn of 1944, we had in service overseas 3,690,000 soldiers, exceeding by 1,600,000 the peak overseas strength in the first World War, and only 350,000 short of the entire

¹ 55 U. S. Stat. at Large, 844. From first to last, persons having sincere scruples against bearing arms have been excused from combatant service and permitted to absolve their wartime obligations by service in the Army medical corps, soil conservation or forestry projects, or other non-combatant units. See J. W. Masland *et al.*, "Treatment of the Conscientious Objector," *Amer. Polit. Sci. Rev.*, XXXVI, 697-701 (Aug., 1942); J. Cornell, *The Conscientious Objector and the Law* (New York, 1943); G. F. Hershberger, *War, Peace, and Non-Resistance* (Scottsdale, Pa., 1944).

² There were, of course, later periodic registrations, designed to reach men currently arriving at the prescribed minimum age.

strength of the Army when that war ended; and at this same time, the Army's over-all strength amounted to 7,700,000 officers and men (sixty times its prewar size and a hundred times its prewar striking power), with large numbers all the while being released from service for various reasons, but with newly inducted men pushing the total to higher levels—although the ultimate peak required was not expected to exceed eight millions,¹ and with the prospect of reduction considerably below that figure as soon as the defeat of Germany should have become a reality.²

Administratively, the Army comprises a service under the aegis of the Department of War, precisely as the Foreign Service forms an arm of the Department of State or the Customs Service an arm of the Treasury Department. Indeed, the Department of War (dating from 1789), although in the past invested with a good many functions of a non-military nature, now has little to do except manage the military establishment, in peace and war, and under responsibility, as in the case of all executive departments, to the president. Although commander-in-chief, the president is always technically a civilian;³ the ranking officers of the Department—the secretary, under-secretary, and assistant secretaries—are invariably such; and thus the principle of civil superiority over the military is maintained. Going down the lengthy list of lesser officials in the Department, one finds civilians and military men intermingled; and of course the Army itself, in the stricter sense, is officered by military personnel exclusively.

Army
organi-
zation

Army organization, as such, is a complicated and technical matter lying outside the range of the present discussion except for one or two features to be mentioned in passing, and chiefly the drastic reconstruction carried out in 1942. Hardly was the country in a war of obviously unprecedented proportions before military leaders perceived the need for replacing an old form of organization based on infantry, cavalry, field artillery, coast artillery, and air units with a new one more in keeping with the superior systems employed abroad and with the tasks now to be undertaken; and after an exhaustive study by experts extending over more than a year, President Roosevelt, by executive order of March 2, 1942, authorized a new type of organization effective in the first instance for the duration and for six months thereafter, but likely to a large extent to become permanent. The general purport of the plan was to reconstruct the vast military machine at the time taking shape so as to consist of three great branches—the Army Ground Forces (infantry,

¹ That figure was slightly surpassed by January 1, 1945.

² On May 14, 1942, a bill was approved establishing a Women's Army Auxiliary Corps (WAAC), designed to utilize the services of women and thereby release soldiers for combat duty. Within a little over a year, 65,000 women were members; and in 1943 the status of the Corps was changed from that of an Army auxiliary to that of an actual component of the Army.

³ He may have had military experience; in fact, several presidents (Washington, Jackson, Taylor, Grant, etc.) had previously attained the rank of general. When president, however, all have been civilians.

artillery, cavalry, etc.), the Army Air Forces, and the Services of Supply (now known as the Army Service Forces)—the first two concerned with combat, the third with "supply, procurement, and general housekeeping duties";¹ and the carrying out of this extensive reorganization (with entirely successful results) in the most critical and perplexing period of the war was a praiseworthy achievement. At the same time, an overgrown General Staff, charged with formulating basic plans and policies for developing and using the Army, and with advising the president and secretary of war on such matters, was so far reduced and integrated as to emerge with ninety-eight instead of some five hundred members, sixty of them organized in a special War Plans Division, and all drawn, in proportions of thirty-nine, thirty-nine, and twenty, respectively, from the three basic branches mentioned above. Heading the General Staff, and with supervision over all three Army branches, is the Chief of Staff, immediate adviser to the secretary of war, and the medium through which the president, as commander-in-chief, exercises his functions in relation to strategy, tactics, and operations.²

The Defense Forces as Developed Since 1940—The Navy

The Navy
and its
auxili-
aries to
1940

From Revolutionary times, the United States maintained a navy of lofty traditions, but of no great size until the close of World War I, when, with an imposing fleet afloat and a still more powerful one on the stocks, the country found itself with the scepter of sea supremacy within its grasp. At the Washington Conference on the Limitation of Armaments, in 1921-22, however, agreements were entered into among the leading naval powers under which thirty-one of our capital ships were sunk, scrapped, or demilitarized; and the London Naval Conference of 1930 led to similar sacrifice of cruisers, destroyers, and submarines. For more than a decade after the former date, little new building was undertaken—even less than the agreed ratios of capital ships would have permitted.³ Partly with a view to creating jobs in depression times, a substantial building program was, nevertheless, launched in 1933; and after

¹ It is in this branch that one will find not only the Office of the Quartermaster General, charged with providing food and clothing for the troops, and the Office of the Chief of Ordnance, charged with providing weapons and other munitions, but such special offices as those of the Judge Advocate General, the Adjutant General, the Provost Marshal General, the Chief of the Army Transportation Corps, and the Women's Army Corps. For the duties of these and other units, see *U. S. Government Manual* (Summer, 1944), pp. 253-254.

² Names that became familiar to all Americans during the present war include those of General George C. Marshall, Chief of Staff; Lieutenant General Lesley J. McNair, Commanding General, Army Air Forces; and General Brehon Somervell, Commanding General, Army Service Forces.

On the historical development of the War Department, see H. B. Learned, *The President's Cabinet*, Chap. I, and P. Herring, *The Impact of War*, Chap. IV. Cf. "The War Department," *Fortune*, V, 38-42 ff. (Jan., 1941); latest issue of *U. S. Government Manual*; and latest *Annual Report of the Secretary of War*. There is as yet no readily accessible systematic treatise on the Army of the United States in its current wartime aspects.

³ The ratios for battleships, heavy cruisers, and aircraft carriers were: Great Britain and the United States, 5 each; Japan, 3; France and Italy, 1.67 each.

it became apparent not only that other nations (particularly Japan) were rapidly increasing their naval strength by building all types of fighting craft not covered by the ratio agreement, but that the Washington Treaty would not be continued beyond 1936, the effort was redoubled, bringing the country—at least by 1938, when an over-all increase of naval strength by twenty per cent was authorized by Congress—into a fast-accelerating armament race. All told, 137 combatant vessels were built between 1933 and 1940, although many merely replaced obsolete craft; and in September, 1939, when Hitler plunged Europe into war, our naval personnel, aside from auxiliaries, still numbered only 126,418 officers and men.

Of naval auxiliaries, there were two with actual Navy connections: (1) the Naval Reserve Officer Training Corps, organized to supplement officer-training provided at the Naval Academy at Annapolis, and recruited from training units maintained in colleges and universities throughout the country; and, (2) the Marine Corps, organized on Army lines to provide the Navy with trained infantry for land fighting or other duty whether ashore or afloat. In addition, there were two potential auxiliaries—not organically connected with the Navy, but capable of being linked with it in case of need. These were: (1) the Coast Guard, attached to the Treasury Department, and in peacetime charged, as a sort of maritime police, with saving and protecting life and property in coastal waters, safeguarding navigation on the high seas, and, in general, enforcing maritime law, including the suppression of smuggling; and (2) the merchant marine, at a low ebb in the period under review, but having at least some ships which could be armed so as to bear a share in sea warfare. When war started in Europe in 1939, our Marine Corps numbered only 19,701 officers and men and the Coast Guard 10,079.

Five days after Hitler sent his legions thundering across the Polish frontier in September, 1939, President Roosevelt declared a "limited emergency," which for the Navy meant an immediate increase of authorized strength to 191,000 officers and men and recall to active duty of all trained personnel on the retired and reserve lists. Eight months later, with the international situation growing still more critical, and with even the destruction of the British Navy (on which our own security had long heavily depended) looming as a possibility—and as a phase of the huge defense effort now being launched—a program of naval expansion was instituted contemplating expenditure, over a period of years, of upwards of five billion dollars and aimed at making the United States fleet by 1946 the most powerful that had ever ploughed the seas. Dominant in this program was the new idea of a "two-ocean Navy." Up to now, with the British Navy affording us protection in the Atlantic, we had for a good while been accustomed to keep the larger part of our fighting ships in the Pacific, based upon Hawaii. With the British Navy endangered, we, in 1940, moved much of our fleet through the Panama Canal into the Atlantic. The Pacific, however, was obviously also a

Naval development on the eve of war, 1940-41

theater of increasing danger; and hence the plan embodied in a Two-Ocean Navy Bill signed by President Roosevelt on July 19, 1940, to develop a navy strong enough to be divided between the two oceans and yet have "command of the sea" in each. The increase in our naval strength now authorized was by far the greatest in our history to this time; and although obviously the contemplated building would occupy years, even by December 7, 1941, much had been done¹ and the effective personnel of the Navy had risen to 325,095, not counting 70,425 officers and men in the Marine Corps and 25,002 more in the Coast Guard—which a month previously had been transferred for the period of emergency to the Navy Department. A navy consists, however, not simply of ships, aircraft, shore fortifications, and men, but also of bases. And incident to the strengthening of our naval defenses in 1940 was the lease from Great Britain of sites for eight naval and air bases in or adjacent to the Atlantic² (two as gifts and six in exchange for fifty of our over-age destroyers), calculated ultimately to permit regular naval and air control a thousand miles farther eastward than otherwise would be feasible. Moreover, the development of these sites was actively under way when war enveloped us in 1941. As planned, our ring of naval bases was to stretch from Newfoundland through the islands of the nearer Atlantic, thence in the Pacific to the Aleutian Islands, and across two thousand miles of open ocean to Pearl Harbor, and on out to Midway and Johnson Island.³

The war-time
Navy

Of course there was no guarantee that the country would not find itself at war long before the building program authorized in 1940 could be carried out, in which case it would have to rely on existing units at the outset, increasing them thereafter as rapidly as it could. The sudden outbreak of hostilities in December, 1941, created precisely such a situation; and from that time forth the building and launching of naval, as well as merchant, ships proceeded on a scale never before approached in this or any other country. The story—which would embrace the expansion of shipyards and establishment of new ones, the enlisting and training of hundreds of thousands of technicians and laborers, the supplying of the needed machinery and tools, and the construction and launching

¹ At that date, the Navy's combat vessels included 17 battleships, 7 aircraft carriers, 37 cruisers, 170 destroyers, and 113 submarines.

² In Newfoundland, Bermuda, the Bahamas, Jamaica, St. Lucia, Trinidad, Antigua, and British Guiana.

³ On the new Atlantic sites, see A. R. Elliott, "U. S. Strategic Bases in the Atlantic," *Foreign Policy Reports*, XVI, No. 21 (Jan. 15, 1941); and on our Pacific bases, the same author's "U. S. Defense Outposts in the Pacific," *ibid.*, XVII, No. 1 (Mar. 15, 1941). The text of the agreements concerning the Atlantic bases will be found in S. S. Jones and D. P. Myers, *Documents on American Foreign Relations*, III, 203-227. On the relation of the Panama Canal to the defense problem, see N. J. Padelford, *The Panama Canal in Peace and War* (New York, 1942).

On the program of naval expansion in 1940-41, see W. D. Boutwell *et al.*, *America Prepares for Tomorrow*, Chap. xviii; F. Knox, *The United States Navy in National Defense* (Washington, 1941); D. H. Popper, "America's Naval Preparedness," *Foreign Policy Reports*, XVII, No. 2 (Apr. 1, 1941). Cf. H. W. Baldwin, *What the Citizen Should Know About the Navy* (New York, 1941).

of literally thousands of ships and airplanes—cannot be told here; indeed, until the war is over, some parts of it cannot be told anywhere.¹ Suffice it to say that, with building still actively in progress, the American Navy is already by all odds the largest and strongest in the world. Doubtless it will remain such in postwar years. Meanwhile a few facts are pertinent concerning personnel organization. Like the Army, the Navy and its auxiliaries were recruited before the war entirely from volunteers; and for a time, in the case of the Navy, this continued to be true after Pearl Harbor. The first effect of that disaster was, indeed, to yield a heavy increase in enlistments. During 1942, however, volunteering fell off; and on December 5 it was ordered terminated as of the following February, after which date Navy and Army enlisted personnel (as indicated above) were alike recruited exclusively through the operation of the selective service system. By December 31, 1943, the Navy had reached a total of 2,252,606 officers and men, the Marine Corps a total of 391,620, and the Coast Guard of 171,518; by the autumn of 1944, the total over-all figure for the entire naval establishment was 3,717,000.²

On the analogy of the Army's relation to the War Department, the Navy is a service under the aegis of the Navy Department, the latter dating from 1798, when a threatened war with France led to its creation; and, in stricter degree than the War Department, the Navy Department has had functions related only to the management of the one great service intrusted to it.³ Here again, not only is the commander-in-chief (the president) a civilian, but likewise the secretary, under-secretary, and assistant secretaries, thus preserving the principle of civilian supremacy; here again, too, the lesser officials include both civilians and naval men, but with a greater preponderance of non-civilian personnel than in the War Department; and of course the Navy as such is officered by naval men exclusively. In general, the administrative work of the Department is distributed among a lengthy list of bureaus forming branches of the Executive Office of the Secretary; while the more professional work falls to another series, under "chiefs," and including establishments having to do with naval operations, naval personnel, ordnance, ships, aeronautics, yards and docks, and medicine and surgery. There is an over-all commander-in-chief of the United States fleet and a general

Naval
organi-
zation

¹ Some approach to an official account of the progress and types of building will be found in *Our Navy at War; A Report to the Secretary of the Navy*, by Admiral Ernest J. King, dated March 27, 1944, and to be found conveniently in a special issue of the *U. S. News*, published (without date) early in the year mentioned.

² Important new units organized during the war included (1) the Construction Battalions ("Seabees") dating from December 28, 1941, and consisting of men trained primarily as construction workers but also as fighters, and (2) the Women Accepted for Volunteer Emergency Service ("WAVES"), authorized on July 30, 1942, to provide women trained for shore jobs from which men could thus be released for sea duty. By 1944, the personnel of the Seabees numbered nearly a quarter of a million, and that of the WAVES some 47,000.

³ The Department administers the affairs of a few insular possessions in the Pacific (chiefly Tutuila in Samoa and Guam, retaken from the Japanese in 1944), of significance chiefly in relation to naval policy and strategy.

staff (with a chief and several assistant chiefs); and likewise there are commanders-in-chief for each of two regional fleets, Pacific and Atlantic.¹ Some reorganization has been carried out during the war, but none of as basic significance as in the case of the Army.

Some Defense Questions for the Near Future

How
much
armed
strength?

Before turning from the military to the civilian side of the defense and war effort of recent years, we should glance at one or two questions which, along with others, will have to be answered as the country moves from a war to a peace footing; already they are receiving attention in Congress, in Army and Navy circles, and in the press. Chief among them is: how strong an army, navy, and air force should the United States expect to maintain in coming years? After peace returns, there may, of course, be a considerable pacifist reaction, inspired by war-weariness. At the date of writing (1945), however, the indication is that public sentiment will support and demand continued national preparedness on a rather high level. In this country, as elsewhere, wartime discussions of ways and means of organizing a lasting peace have evinced significantly little interest in the once-lauded principle of disarmament. We have learned that, while huge armaments may promote wars, the absence of armaments does not insure against them; our own experience has shown how quickly an unarmed nation can gird itself for combat. We know, moreover, that the world of the past has disappeared, that with the progress of technology the security we once enjoyed is no longer ours, that henceforth, unless heavily guarded, we shall be open to attack from the most distant sources; and while we hope for some form of international organization that will make the way of the aggressor hard, we are, or should be, realistic enough to be unwilling to put our faith in this alone or to accept the easy assumption that this war will end all wars. We, furthermore, shall emerge from the war, not only with the greatest navy and air force, and with one of the greatest armies, that the world has ever known (and also with new naval and air bases scattered throughout the world), but undoubtedly counting upon at least our naval and air supremacy remaining unassailable, particularly in the Pacific. It is possible that in the fields of naval and air armament some international agreement fixing limits (after the principle of the Washington Conference naval treaty of 1922) will be adopted, at the close of the war or later. But there is no assurance of this; and in any event our naval and air equipment and forces of the future may be depended upon to outdistance anything we ever before had, or expected to have, in peacetime.

The special problem of the Army

The main question will be as to the Army. That for a period after the war our obligations in the defeated countries may require us to keep under arms as many as three or four million men, with perhaps two million retained for as long as a decade, is taken for granted. But what

¹ There was formerly also a small Asiatic fleet, but it ceased to exist in 1942.

of our general policy, looking ahead to days after the present war shall have been fully liquidated? Here, obviously, the alternatives are: (1) to decide upon a permanent large standing army; (2) to plan for a much smaller standing army, but supported by a large reservoir of trained citizen-reserves; (3) to revert to our prewar situation, with a small standing army reinforced only by the National Guard and by limited numbers of young men trained, mainly in colleges and universities, for officer duty. All our traditions argue powerfully against the first of these courses; and it is not to be believed either that high Army authorities would insist upon it or that public sentiment would tolerate it. Nor do either Army officials or serious-minded private citizens look with any favor upon the third course, at least until it shall be established that the nations of the earth have indeed mastered the art of living amicably together.

The only course remaining would therefore appear to be the second; and discussions of the problem in these later days are addressed chiefly to the most desirable mode of pursuing it. At the close of World War I, Army and Navy officials, backed by President Wilson, strongly advocated—as indeed did President Washington in his remote day—the adoption of a system of universal military training, to provide a back-log of civilian personnel available for active armed service whenever needed. In turning a deaf ear to the proposal, Congress doubtless acted in accord with public opinion. But the idea has been revived; and the experience through which the country has recently passed now gives it greater chance of success. The late President Roosevelt and numerous other influential civilians have spoken out for the plan; and in 1944 General George C. Marshall, Army Chief of Staff, gave it his unqualified endorsement, insisting that the permanent postwar Army should consist of “the smallest possible professional organization,” but, as being merely a nucleus, should be buttressed with a vast trained reserve. The proposal, concretely, is (1) that all male youth, except those seriously incapacitated physically or mentally, be required to devote one year (probably at about the point of graduation from high school) to special training, under auspices of the Army, and primarily military, although certainly including general physical correction and development, with perhaps other practical instruction of various kinds;¹ and (2) that, following such training, all youth who have received it shall remain members of the reserve components of the Army for some reasonable period, probably five but possibly ten years—although it is alternatively suggested that mere liability to draft would be sufficient. The number that would come up for training each year has been estimated at rather more than one million. In the eyes of many people, the plan bears too much resemblance to long-prevailing

Proposal
for com-
pulsory
military
training

¹ President Roosevelt conceived of the training as having broad educational and social aspects; the War and Navy Departments consider that it should be for combat purposes only.

European systems of conscription and universal service, and appears out of keeping with our concepts of freedom and democracy. Considerable expense, too, would be entailed, at a time when there will be great pressure for reduction of taxes. The point is made, however, that the discipline and training afforded would be beneficial, physically and otherwise, to most of the youth enrolled, quite apart from any practical military applications of them; and, anyway, the argument that the system would be out of line with American concepts and usages in the past is not too convincing in an era in which the nation manifestly must, in any event, adjust itself to an unusual variety of conditions and procedures not of its own choosing—among them the liability, because of revolutionized military techniques, to swift disaster unless large trained forces stand ready to be mobilized instantly.¹

Sug-
gested
consoli-
dation:

1. Of
War and
Navy
Depart-
ments
and
services

Mention, finally, may be made of oft-recurring proposals (1) to consolidate the War and Navy Departments into a single Department of Defense or of Armed Forces, and (2) to bring together Army, Navy, and postal aviation administration in a new executive department of aviation, on the plan of the British and other European air ministries. The oft-repeated suggestion of combining the War and Navy Departments—which, of course, would bring the nation's fighting forces under a single management—was revived in a bill before Congress in 1942 and was studied by a special House committee in 1943-44. By rather general agreement, so drastic and complicated a reorganization would not be desirable in the midst of war; and while the House committee was of the opinion that over the long future there should be even closer coördination of the military and naval services than that rather conspicuously achieved in the present conflict, there has been, in the committee and outside, wide difference of opinion as to whether gains to be expected from consolidation would not be offset by various disadvantages. In general, Army witnesses (including Secretary of War Stimson) appearing before the special committee favored the change, with Navy witnesses opposing. Advocates stress the benefits to arise from integration of command and avoidance of duplication; opponents fear the "inertia of size" and deplore any loss of the healthy competition, as they view it, now existing between

¹ An Institute of Public Opinion poll taken throughout the country in September, 1944, showed sixty-three per cent of the persons interviewed to be favorable to the plan. If this proportion holds for the public at large, legislation on the subject is not unlikely. Even if it does not, there is bi-partisan sentiment in Congress for going ahead with the plan and afterwards educating the nation to its necessity and advantages. A bill for compulsory training was introduced in the House of Representatives by James W. Wadsworth of New York, author of the Selective Service Act, as early as January, 1942, and another by Andrew J. May (chairman of the House military affairs committee), providing for military training exclusively, in December, 1944. The latter bill and the entire subject to which it related were expected to receive full consideration in 1945 by a special House postwar military policy committee consisting of seven representatives each of the military affairs and naval affairs committees and nine members of the House selected at large. For arguments both ways on the general question of policy involved, see J. E. Johnsen [comp.], *Compulsory Military Training* (New York, 1941).

the two services.¹ After the war, at all events, some decision will have to be reached; and probably the case for consolidation will be found to have been strengthened by the growth of amphibious warfare, the success of unified theater command, and the experience with joint and combined chiefs of staff which have characterized the present conflict.

If there is not to be a consolidation on the foregoing lines, the question comes of whether, in view of the magnitude that military and naval aviation has assumed, it would not be desirable at least to unify Army and Navy air forces and place the administration of them in a single separate executive department (which might or might not be planned to embrace postal aviation also). In general, the idea has been opposed by both of the departments concerned, each preferring to retain control over an air force of its own. There are arguments both ways. What chiefly matters is that there be proper coördination between surface and air units—so conspicuous in the German operations of 1939-40, so sadly lacking in the French attempt at defense in the last-mentioned year. Results achieved in all theaters in which American forces have been engaged indicate that in the present war such coördination has been generally attained under the existing system.

² Of air forces

Civilian Mobilization

As emphasized in the preceding chapter, war entails far more than amassing and using military, naval, and air power. There is also the mobilization of the nation itself—the harnessing of resources and industry (including, of course, the production of guns, tanks, ships, aircraft, and ammunition), the utilization of maximum civilian manpower, the control of transportation, the “stock-piling” and distribution of critical materials, the regulation of consumption and of prices, the supervision of channels of information, the promotion of defensive precautions by the people in their own communities, and plenty of other activities, aimed at providing the armed forces with what they need for protecting the national interests and sustaining the public morale and preventing intentional or inadvertent damage to those interests through ill-advised speech or publication. Here, too, as in building up the armed forces, a good beginning, especially in the stimulation of production, was fortunately made while we were only “partly in the war,” i.e., in 1940-41; indeed, many of the major lines of economic mobilization pursued in later days were instituted before Pearl Harbor.

Magnitude of the task in the present war

The task of getting the nation into a state of defense commensurate

¹ *Postwar Military Policy, Select Committee on Proposal to Establish Single Department of Armed Forces. Hearings, 78th Cong., 2nd Sess., Pursuant to H. Res. 465 (Washington, 1944).* Whatever other considerations are involved, there can be no doubt that, on the legislative end, unity and speed in the consideration of defense problems are at present obstructed by the large number of separate committees in Congress having to do with aspects of the subject, notably the Senate and House military affairs committees, the Senate and House naval affairs committees, the military and naval sub-committees of the appropriations committees of the two houses, and to a somewhat less extent the two foreign affairs committees.

with the dangers confronting it was stupendous. For a decade, industry, hard hit by the depression, had been dragging along on a low level. Many plants were run down; much equipment was obsolete; upwards of twelve million workers were unemployed. The physical fitness, too, of large numbers of people had been impaired by poverty.¹ Nevertheless, within a year's time, *i.e.*, by the summer of 1941, industrial production was showing the greatest upsurge ever witnessed in this country; and with war bursting upon us before the year was over, the pace was redoubled. Thenceforth, armed forces, in mounting numbers, were to be equipped and transported to the four corners of the earth; supplies, in staggering quantities, were to be furnished to Britain, Russia, and China, even while our own needs were catapulting to new heights; ² indispensable materials like rubber, no longer obtainable from the customary sources, were somehow to be provided through other channels; national manpower was to be turned to its most effective uses; prices were to be kept in hand as a safeguard against run-away inflation; in short, a wartime economy was to be developed, managed, and made to meet the exigencies of a situation in many respects unprecedented.

The rôle
of regu-
lar agen-
cies

To review the development and activities of the stupendous mechanism of authorities and agencies ultimately employed in meeting the situation described would involve us in a tangle defeating the purposes of the present outline or over-all survey.³ Let it be remembered, first of all, that a great deal of the extra work entailed has at all stages been performed by regular agencies of the national government (with assistance from state and local governments), from the president and Congress down to the lowest levels of administrative management. The War and Navy Departments have enormously expanded their activities; the Treasury Department shapes fiscal policy, collects revenue, and borrows money, most largely from banks, but also by selling war bonds and stamps; the Department of Agriculture stimulates and controls the production of farm products needed in this country or by the Allied nations;⁴

¹ In calling up selectees, it was necessary to assume that one out of every three would be rejected as physically unfit.

² Under the Lend-Lease Act of March 11, 1941 (extended in 1943, 1944, and 1945), Congress began placing at the disposal of the president multiplied billions which he could turn over, in the form of goods or of credits for the purchase of such, to the governments of any countries whose war efforts he should regard as helpful to the United States; and within a year the sums involved mounted to over eighteen billions. Management of this huge and still-operating enterprise is vested in an Office of Lend-Lease Administration, now attached to the Foreign Economic Administration, itself a branch of the Office for Emergency Management to be spoken of presently. For a full account, see E. R. Stettinius, *Lend-Lease; Weapon for Victory* (New York, 1944). The author was lend-lease administrator until 1943.

³ The most convenient guide to these authorities and agencies at successive stages of the defense and war effort is the *U. S. Government Manual* (new edition three times a year). The defense machinery in its earlier phases is described in J. P. Harris, "The Emergency National Defense Organization," *Pub. Admin. Rev.*, I, 1-24 (Autumn, 1940); and an elaborate diagram depicting it appears in a supplement to *Fortune*, Aug., 1941.

⁴ In December, 1942, the secretary of agriculture was designated national food administrator, with sweeping controls over the country's food supplies and their

the Department of the Interior contributes, among other ways, by handling the difficult problem of oil and gasoline supply; the Federal Works Agency supervises many defense works projects; the U. S. Maritime Commission promotes ship-building; the Federal Power Commission helps see to it that power is supplied for defense purposes; the T.V.A. steps up its production of both power and chemicals; and so on and on.

Superimposed upon these regular agencies, however, has been a maze of special ones, called into being in nearly all instances by executive order (with or without express congressional authorization), and so frequently renamed, reconstructed, or replaced as often to bewilder even the close-hand observer in Washington.¹ In the nature of things, the new machinery must be tied in closely with the chief executive (whose functions as such merge imperceptibly into those of commander-in-chief); and as early as May, 1940, an Office for Emergency Management, envisaged in Reorganization Plan No. 1 as an agency to be set up by the president in case of emergency or the threat of such, was given actual form on lines enabling it gradually to develop into a framework within which almost the entire newly constructed civilian war organization has been set up. The Office has been, in a sense, only a name; as such, it does not even have a head or a staff, except as, of course, ultimately the president is its head, with one of his assistants charged with keeping him informed on the activities of the numerous establishments embraced within it. As of the date of writing (1945), these establishments include:

The
Office
for
Emergency
Management

1. War Production Board
2. Office of Economic Stabilization
3. Office of War Mobilization
4. Foreign Economic Administration
5. War Shipping Administration
6. Office of Defense Transportation
7. War Manpower Commission
8. Office of Civilian Defense
9. National War Labor Board
10. Committee on Fair Employment Practice
11. Office of Alien Property Custodian
12. Office of the Coördinator of Inter-American Affairs
13. Office of Scientific Research and Development
14. Office of War Information
15. Division of Central Administrative Services

Most of these titles rather obviously indicate the nature of the functions involved—functions which, it will be seen, relate in some instances

distribution; although in the following year a separate food administrator was placed in charge of consolidated agencies eventually forming the present War Food Administration. During the first World War, a similar post was held by Herbert Hoover.

¹ The labyrinth became such as to give some point to the story of the Japanese spy who is supposed to have sent word to Tokyo in 1942 that it would be a waste of explosives to bomb Washington because no matter what unit of government was hit two or three others would be left doing the same thing.

to the production of war materials and supplies, in others to transportation, in still others to labor relations, use of manpower, communications, civilian welfare and morale, research, or economic and cultural relations abroad. From the welter of activities envisaged, only half a dozen can be singled out for comment here.¹

1. War
produc-
tion

Aside from recruiting and training men for the armed forces, the top-most wartime necessity is the provision—speedily and nowadays in almost incredible amounts—of munitions and supplies. And in a democracy like ours this task is more complicated and difficult than the other, because, whereas in one case the government is in a position to act when and where and to what extent it pleases, in the other it has to achieve its ends largely through dealings with a multitude of private producers amidst all the uncertainties, cross-purposes, and distractions (*e.g.*, labor troubles) incident to the workings of our economic system. To be sure, in wartime our government may go as far as it likes in conscripting property, labor, and management (precisely as it drafts men for armed service), and therefore may compel peacetime industries to convert to war production, may order such industries to produce this or that according to specifications, may take over industries and make any desired arrangements for operating them—as well as, of course, start industries of its own. In the early stages of the present war, there were those who thought that the government should take over any or all private industry considered important for war use. The idea, however, did not prevail. The government did establish numerous munitions plants (usually operated under contract by private corporations) and finance the expansion of old plants of various kinds or the establishment of new ones; and for longer or shorter periods it took over plants here and there to keep operation from being interfered with by labor difficulties. But it did not waver from the policy of relying principally upon mobilizing the products of private industry to meet its needs. The agency most directly concerned with stimulating and guiding such production has been the War Production Board, dating from 1942, although preceded by an equivalent organization going back to the beginning of the defense effort in 1940; and it was under such direction not only that the manufacture of many consumer goods was checked or stopped and the turning out of war supplies pushed from peak to peak, but that stockpiles of essential raw materials were built up and priorities established for funneling materials to war industries most in need of them.²

It has already been intimated that the national government could, if it chose, register all people outside of the armed forces for civilian war work and assign them to jobs. Despite many proposals in Congress during the present war that something like this be done, no policy so far-

¹ Those pertaining to labor relations have been touched upon elsewhere. See pp. 617-618 above.

² D. O. Walter, *American Government at War*, Chaps. I-II; L. V. Howard and H. A. Bone, *Current American Government*, Chap. x.

reaching has been adopted. Since 1942, however, a War Manpower Commission has been concerned with promoting the most effective mobilization and maximum utilization of the country's civilian manpower (and to a less extent womanpower as well); and in conjunction with numerous other agencies, such as the Selective Service System, the Department of Labor, and the labor boards functioning in relation to industrial disputes, it has served a useful purpose in keeping our people at work, and in places and jobs where they are most needed, not only in industry but in transportation and agriculture as well. By and large, the individual worker is still a free agent. At plenty of points, however, the element of compulsion enters in, as many men of military age have found when confronted with, in effect, the alternative, "work or fight."¹

As early as 1941, dislocations incident to the emphasis upon defense industry began to be reflected in rising prices; when Pearl Harbor was attacked, the general cost of living had already gone up eleven per cent. Nothing was more certain than that, unless rigorous checks were applied, prices would continue upward as spending power increased and consumer goods grew scarcer, with the effect of augmenting the cost of war supplies, stirring discontent in the ranks of labor, pressing hard upon people with fixed incomes, and quite possibly leading to disastrous inflation. Restrictive efforts through an Office of Price Administration established in the Office for Emergency Management in 1941 were of slight avail, because of lack of power actually to fix and enforce price-ceilings. An Emergency Price Control Act of January, 1942,² (incidentally making the O.P.A. an independent establishment, as it is today) corrected the situation to some extent, with the defects, however, that it left wide latitude for prices of farm products to continue rising, and also did not touch wages. In the late summer of 1942, growing dangers from these sources influenced President Roosevelt to threaten independent executive action curbing farm prices, regardless of existing law, unless Congress took remedial steps; and as an upshot legislation was passed permitting stabilization not only of farm prices, but also of wages, at the levels of September 15, 1942.³ Prior to this time, rents had been subject to federal control in relation only to housing in defense areas. Congress, however, now authorized rent stabilization for all real property

8. Price control and rationing

¹ In his message of January 6, 1945, President Roosevelt voiced a growing belief that new measures were needed for ensuring production of the necessary materials for war, and urged Congress to enact legislation "for the total mobilization of all our human resources at the earliest possible moment." During the following March, the House of Representatives passed a fairly strong bill on the subject and the Senate a weaker one. But, despite continued appeals from the White House, a compromise measure worked out in conference met defeat in the upper branch.

² 56 *U. S. Stat. at Large*, 23. Sustained by the Supreme Court in *Yakus vs. United States*, 321 U. S. 414 (1944)

³ A great deal of controversy and confusion might have been saved if, as experience in World War I led some to advocate, prices and wages had been "frozen" at a specified level the moment war began. However, it would have been difficult indeed to get an agreement upon such a policy, and probably such stabilization as was attained had to come piecemeal.

throughout the country, commercial as well as residential. And from early 1942 onwards, broad powers to ration commodities among consumers fell also to the O.P.A., being employed, as every one knows, in connection with not only automobiles, tires, gasoline, fuel oil, farm machinery, coffee, sugar, meats, canned goods, and shoes, but numerous other articles for which demand was out of proportion to supply.¹

4. Transportation

Almost as vital as the production of war materials is the moving of them (and also of troops) to the places where they are needed; and it is not surprising to find that in wartime government exercises special controls over nearly every form of transportation. Less than two weeks after the Pearl Harbor disaster, an executive order set up an Office of Defense Transportation, with jurisdiction (within the general framework of existing transportation controls wielded by the Interstate Commerce Commission and allied agencies) over railroads, inland waterways, air transport, motor transport, coastwise shipping, and pipe-lines; and from that time forth the O.D.T. has supervised railroad traffic so as to get the utmost out of existing trackage and equipment, assure priority for troop movements and for shipments of war munitions and materials, and avert terminal congestion at ports, employing toward these ends a great variety of expedients including the well-known (if not too effective) voluntary curtailment of unnecessary civilian travel. At the same time, it has encouraged the greater utilization and conservation of motor trucks and commercial passenger vehicles (under a ration system), and likewise devices such as group-riding for relieving carriers while also conserving tires and gasoline. Important services, too, have been rendered in connection with the transportation of petroleum and its products, and with coastwise shipping.

5. Information and censorship

War is waged also in the realm of ideas and their dissemination; and any government in wartime will concern itself not only with getting to its people the information it wants them to have and with cultivating a public opinion favorable to the war effort, but also with keeping from the enemy information that would be useful to it and with preventing the enemy and enemy sympathizers from damaging the national morale through open or secret propaganda. The story of our government's efforts since 1940 to keep the nation discreetly informed on the problems, progress, and goals of the defense and war effort would reveal a good deal of fumbling with a difficult problem, leading eventually, however, to a fairly successful integration of responsibility in an Office of War Information established in the summer of 1942;² and since that date the

¹ L. V. Howard and H. A. Bone, *Current American Government*, Chap. x; C. O. Hardy, *Wartime Control of Prices* (Washington, 1940).

² Consolidated in the O.W.I. (in the Office for Emergency Management) were various preexisting agencies, including an Office of Facts and Figures, an Office of Government Reports, a Foreign Information Service, and a Division of Information in the O.E.M. itself. For a time, a war information program was maintained also in the Office of Civilian Defense. See W. H. C. Laves, "The Face-to-Face War Information Service of the Federal Government," *Amer. Polit. Sci. Rev.*, XXXVII,

Office has not only on its own account disseminated information within the continental United States and coördinated and supervised the publicity services maintained by executive departments and other establishments, but also, through an overseas operations branch, has planned and carried out extensive foreign propagandist activities by radio, press, and other means.¹ The reverse of the picture is supplied by organized effort to prevent dissemination of information or opinion which might prove of value to the enemy or damaging to the war effort or morale of our own people; and to undertake this responsibility an Office of Censorship was set up almost as soon as we were in the war. The method employed has been, to a degree, that of voluntary compliance, rather than of positive restriction and regimentation; that is to say, in connection with domestic publications and radio broadcasting, the authorities have issued "codes of wartime practices" telling the press and the broadcasters what they must not print or broadcast, and the people concerned have (very successfully, on the whole) been placed on their honor to act accordingly. Of course, there has been no lack of power to compel compliance where necessary; and in the case of all mail, cablegrams, long-distance telephone calls, radio messages, and other communications going out of (or in the case of mail, coming into) the United States, there is literal censorship in the sense of advance inspection, with decision whether to delete passages or refuse to permit any part to go through. The very word "censorship" is distasteful to our people; but even the most critical recognize that, in wartime, restrictions, in some forms and degrees, are unavoidable.²

The conduct of war is preëminently a national function. This, however, does not preclude collaboration by state and local governments—a contribution essential, indeed, to the solidarity of war effort. In the present war, state and local machinery has been employed in operating the selective service system, the rationing system, and to some extent the system of price control. Quite as important, however—at least until danger of enemy assault upon our home front was removed—has been the matter of civilian defense, involving mainly means and measures for protecting people and property against the many hazards to which war in the current manner subjects them. The principal contingency to be prepared against in the present war was, of course, air raids; and this meant that the arrangements to be made (chiefly in cities) related especially to air-raid wardens and warning devices, auxiliary police and

6. Civilian defense

1027-1040 (Dec., 1943). The corresponding agency during World War I was a Committee on Public Information, headed by the journalist, George Creel.

¹ On the general subject, see H. L. Childs, "Public Information and Opinion," *Amer. Polit. Sci. Rev.*, XXXVII, 56-68 (Feb., 1943); L. V. Howard and H. A. Bone, *Current American Government*, Chap. VII; and a group of articles in *Pub. Opinion Quar.*, VII, No. 1 (Spring, 1943).

² The related subjects of espionage and sedition have been touched upon in another connection. See p. 662 above. B. Price, "Governmental Censorship in Wartime," *Amer. Polit. Sci. Rev.*, XXXVI, 837-849 (Oct., 1942). The author has been at the head of the Office of Censorship since its establishment.

firemen, utilities repair squads, special fire-fighting equipment, first-aid and other emergency medical services, emergency housing, and other units and services of the kind—although activities less associated with the calamities of invasion, and aimed at promoting morale or encouraging production, were also included. Under a Division of State and Local Coöperation created by the Advisory Commission to the Council of National Defense in 1940, state councils of defense, and also local ones, were widely organized; and, with a view to further encouragement of such civilian effort and to better coördination of it with military plans, an executive order set up an Office of Civilian Defense in the Office for Emergency Management as early as May, 1941. Every state eventually created a defense council of its own; several thousand cities and counties did likewise; and, in all, millions of men and women volunteered their services. The O.C.D., however, had no final power of compulsion; and one will not be surprised to learn that there was unevenness over the country in the intelligence, fidelity, and effectiveness with which the state and local agencies performed their functions.¹

The Financial Aspect

Some staggering figures

—World War I is estimated to have cost the United States, in direct and immediate outlays, approximately twenty-six billion dollars, exclusive of ten billions loaned to the governments of associated states and not repaid nor likely to be.² Before the country ever entered the present war at all, it committed itself, in less than two years, to expenditures for defense aggregating more than the foregoing total; and, with war actually at hand, the commitment was almost instantly pushed up to double the amount, exceeding the entire national income in any one of six out of the ten preceding lean years. As pointed out earlier, the President's request in June, 1942, for a war grant of almost forty billions was by all odds the largest single appropriation ever asked for up to that time, although seven months later it was dwarfed by a request for an even hundred billions for war-spending during the ensuing fiscal year; and by mid-1943, such spending was computed to have reached 289 millions a day. Actual spending for war purposes to February, 1945, has been reported by the Treasury Department at 238 billions, without account being taken of sums authorized before that date but expendable later. What the ultimate cost of the war will be—even in terms only of actual outlays during its progress—no man can tell; yesterday's guess of three hundred billions is long since outmoded. Taxation which not only is taking the "profits out of war," but, for many people, the comforts out of life, is

¹ D. O. Walter, *American Government at War*, Chap. iv; R. E. Dupuy and H. Carter, *Civilian Defense of the United States* (New York, 1942); A. Milcs and R. H. Owsley, *Cities and the National Defense Program* (Chicago, 1941).

² If pensions, bonuses, and interest be included, the cost would mount to almost one hundred billions—which carries the unpleasant suggestion that the expense of a war comes mainly after the fighting is over.

raising sums without precedent in this or any other country.¹ A very heavy proportion of our war costs must, however, be met from borrowing; and for a generation to come the national economy will have to be geared to the existence of a debt of astronomical proportions (the guess of three hundred fifty billions—in case the war lasts until 1946—is as good as any), and to the carrying charges that it will entail.² Even so, the price paid for preservation of the liberty and democracy that we defend will not have been too high.

The Beginnings of Governmental Demobilization

Subject, of course, to organizational readjustments from time to time, the national government's machinery of wartime controls reached full maturity by the end of 1943; and, with the war itself far from finished, plans were developed, and some steps actually taken, in 1944 for dismantling agencies or reconstructing them to serve in a coming transition to peace.³ In September of the latter year, indeed, the President instructed the budget director to work out specific plans for such demobilization, supplementary to a variety of plans, on both economic and administrative lines, which had emanated from the National Resources Planning Board and other public or private sources. With huge tasks to be undertaken which would be more or less in reverse of those carried out by the operating and coördinating agencies created for the war, new machinery, too, would be required; and by the autumn of 1944, instrumentalities of the sort already in the initial stages of their work included an Office of War Mobilization and Reconversion and three units established under it, *i.e.*, an Office of Contract Settlement, a Surplus War Property Administration, and a Retraining and Reemployment Administration. With mere mention of these recently appearing agencies for liquidating the war economy, however, the present discussion must close; for the pages on which they will write a new chapter of war and postwar history are of necessity as yet for the most part blank.⁴

¹ Rates of taxation, however, are well below those in Great Britain and some other countries.

² See pp. 496-497 above.

³ Indicative of this transition was the fact that by autumn of the year mentioned the number of workers engaged in producing munitions had declined by nearly a million since the peak of November, 1943, while about one and one-half million service men had been discharged from the armed forces.

⁴ For a series of articles dealing broadly with the country's task of demobilization and reconversion, see F. M. Marx [ed.], "The American Road from War to Peace: A Symposium," *Amer. Politi. Sci. Rev.*, XXXVIII, 1114-1191 (Dec., 1944).

As these pages were closed (May, 1945), announcement was made that the Office of Civilian Defense would be terminated by executive order on June 30; that President Truman was recommending to Congress a reduction of funds for the United States Maritime Commission and other agencies aggregating more than seven billions; and that additional substantial cuts were under consideration, including reductions in employee personnel. See *N. Y. Times*, May 3, 1945. It was indicated, too, that the virtual conclusion of the war in Europe, combined with the favorable progress of the conflict in the Pacific, might make early tax revision feasible.

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CHAPTER XXXVI

TERRITORIES AND DEPENDENCIES—THE PHILIPPINE COMMONWEALTH

The clause authorizing Congress to "dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States"¹ was inserted in the constitution primarily in order to enable the new government to take over an important function assumed and exercised by its predecessor under the Articles of Confederation. With a view to terminating disputes and promoting national unity, four states—Massachusetts, Connecticut, New York, and Virginia—had ceded to the United States large areas claimed by them west of the Alleghenies; and, for the government of the region, the old Congress had adopted, in 1787, a fundamental law known as the Northwest Ordinance—probably the most important single measure enacted during the entire period of the Confederation. Hardly was the Ordinance in effect, however, before the new constitution was framed; and not only was the above-mentioned empowering clause placed therein, but the Ordinance itself was reenacted, substantially unchanged, by the first Congress under the new régime.

Beginnings of territorial government

The significance of the Northwest Ordinance lies not only in its liberal provisions for local self-government, for representation in Congress, and for fundamental civil and political rights, but also in the fact that the plan of government provided for set a standard closely adhered to in practically every law thereafter enacted by Congress for the government of our continental possessions;² indeed, many of the more basic provisions found in later territorial organic acts were copied almost verbatim from the earlier Ordinance. Of equal, or even greater, significance is the plain indication in the Ordinance that the people of the Territory were not to be kept in perpetual subjection to congressional authority, but that, on the contrary, the territorial government was to serve simply as a temporary arrangement until the growth of population should warrant the Territory's admission to the Union as a state, or group of states, upon a footing of equality with the other states. In other words, territorial status was to be merely preparatory to full statehood. From the Northwest Territory, five states were subsequently created, *i.e.*, Ohio, Indiana, Illinois, Michigan, and Wisconsin. In similar manner, from the

Importance of the Northwest Ordinance

¹ Art. IV, § 3, cl. 2.

² In 1790, for example, Congress authorized for the region south of the Ohio River, known as the Southwest Territory, a government very similar to that provided for in the Northwest Ordinance. In territories organized after 1836, however, the appointed council forming the upper branch of the earlier territorial legislature was replaced by a popularly elected senate.

Southwest Territory came the states of Kentucky, Tennessee, Alabama, and Mississippi.

Constitutional Basis of Territorial Government

Power to
acquire
territory

The territorial governments mentioned were created in a region inherited by our present national government from the government of the Confederation; and, of course, it was this western expanse that the framers of the constitution had in mind when they expressly authorized Congress to make all needful rules and regulations for the government of territories. It is not clear that the framers had any intention of authorizing the new national government to acquire other regions (even though contiguous) such as those in which Congress afterwards set up territorial governments. Nevertheless, repeated decisions of the Supreme Court have settled beyond all question that the right of the national government to acquire territory, although not expressly granted, may be inferred from the power to admit new states into the Union, from the power to make treaties, and likewise from the power to carry on war and make peace.¹ By virtue of power implied in one or another of these express grants, Louisiana was acquired in 1803, Florida in 1819, Texas in 1845, Oregon in 1846, California in 1848, Alaska in 1867, Hawaii, Puerto Rico, and the Philippines in 1898, and the Virgin Islands in 1917.

Power to
govern
territory

In the case of territory acquired by peaceful means, congressional authority to legislate for its government begins the moment the title of the United States is established. During time of war, the president, in his capacity as commander-in-chief, governs, through the Army and Navy, any territory occupied by conquest, whether or not eventually retained.² After the establishment of peace, however, his power to govern

¹ As a sovereign state, the United States has also, under international law, the power to acquire territory by discovery and occupation, or by other methods recognized as proper by international usage. This is the basis of our claim to the Guano Islands acquired in 1856, to Canton and Enderbury Islands, and to lands in Antarctica.

² W. W. Willoughby, *Constitutional Law of the United States* (2nd ed.), I, Chaps. xxiii-xxviii; L. Reno, "The Power of the President to Acquire and Govern Territory," *Geo. Washington Law Rev.*, IX, 251-285 (Jan., 1941).

During the present war, the national government has more systematically and extensively prepared officers for military government service than ever before; and, in conjunction with similar officers representing chiefly Great Britain and the Soviet Union, unprecedented numbers have been employed in areas wrested from the Axis Powers. Training was instituted by the Army in a School of Military Government at Charlottesville, Va., and by the Navy at Columbia University, but soon was extended, for the Army, and in the form of a Civil Affairs Training Program, to a number of other universities. See C. S. Hyneman, "The Army's Civil Affairs Training Program," *Amer. Polit. Sci. Rev.*, XXXVIII, 342-353 (Apr., 1944); and cf. B. Alkin, "When Our Troops Occupy," *Harper's Mag.*, CLXXXVI, 238-250 (Feb., 1943); W. Motherwell, "Military Occupation, and Then What?," *ibid.*, CLXXXVII, 439-446 (Nov., 1943); A. Vagts, "Military Command and Military Government," *Pol. Sci. Quar.*, LIX, 248-263 (June, 1944); Lt. J. L. Walden, "AMG Takes Over War's Ruins" [in Italy], *Nat. Mun. Rev.*, XXXIV, 74-78 (Feb., 1945).

On the history of American military government in occupied territories, and powers possessed under international law, see R. H. Gabriel, "American Experience

must be based (a) upon authority granted by the constitution to see that the laws are faithfully executed, or (b) upon some act of Congress for the government of the conquered territory, or (c) in the absence of any act of this nature, upon the implied consent of Congress that the government set up under his military authority be continued. At different times, Congress has temporarily clothed the president with practically absolute authority over an annexed territory. But sooner or later it established, in nearly all of the areas acquired before the Civil War, governments similar to those created in the old Northwest and Southwest Territories; and ultimately all such territories were admitted as states. The only exceptions to the usual procedure were in the cases of Maine, Vermont, Kentucky, West Virginia, California, and Texas, which were admitted as states without having passed through the territorial stage."

The admission of two of the states named, and the organization of territorial government in those portions of the national domain not covered by the Northwest and Southwest Ordinances, furnished occasions, prior to 1860, for many exciting sectional controversies over slavery. At no time, however, has the full power of Congress to fix the form of territorial governments been successfully challenged; and the principle has become firmly established that such governments exist merely as the instrumentalities by which Congress exercises its authority over the territories.

With the exception of Alaska, all territories acquired by the United States before the Spanish-American War were contiguous, and had been settled and developed by natives of this country and by European immigrants whose civilization and traditions were not fundamentally different from our own. Consequently, Congress had little or no hesitation about extending to them a large measure of self-government and all of the civil rights guaranteed by the national constitution. The Spanish-American War, however, brought under the control of the United States non-contiguous territory lying in the tropics and inhabited by relatively backward peoples of different race and language, almost totally inexperienced in self-government, and enjoying none of the civil and political rights which long have been the cherished heritage of our own citizens. Admittedly, the power to govern these new possessions resided in Congress; and at first glance it seemed necessary, in view of earlier Supreme Court decisions, to extend to their inhabitants all of the rights and privileges enumerated in the constitution, including freedom of speech and of the press, the right to bear arms, and trial by jury. Embarrassing results, however, that might flow from such adherence to legislative and judicial precedents made it highly desirable to draw some distinction between the legal status of these new acquisitions and that of

New
problems
after the
Spanish-
Amer-
ican War

"Incor-
porated"
and
"unin-
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tories

with Military Government," *Amer. Polit. Sci. Rev.*, XXXVII, 417-438 (June, 1943); A. C. Davidson, "Some Problems of Military Government," *ibid.*, XXXVIII, 460-474 (June, 1944); Anon., *American Military Government of Occupied Germany* [at the time of World War II], (Washington, D. C., 1943).

the older territories on the continent; and in a series of decisions, beginning about 1900, the Supreme Court developed such a distinction, thereby releasing Congress from some of the restrictions under which it had previously dealt with territorial problems.¹

The distinction evolved was one as between territory "incorporated" in the United States and territory "not incorporated."² In the former category were included Alaska, Oklahoma, New Mexico, and Arizona, none of which, at the time the decisions were handed down, had been admitted to statehood. In legislating for the incorporated territories, said the Court, Congress was bound by all constitutional limitations not clearly inapplicable. Hawaii, Puerto Rico, and the Philippines, on the other hand, were held to be "unincorporated" territories. To be sure, they belonged to the United States rather than to any foreign power; they were appurtenant to, and dependencies of, the United States. But they were not *parts* of the United States in the sense in which the incorporated territories were. Consequently, Congress, in legislating for them, was not bound by all restrictions in the constitution regarded as applicable to the incorporated territories, but only by the "fundamental" parts of the instrument. *These* parts, we were told, automatically extend to all territories of the United States as soon as they cease to be foreign territory; the "formal" parts, on the other hand, apply to unincorporated territories only when Congress expressly so directs.

Illustrations

The Court has never attempted to make an exhaustive enumeration of the fundamental and the formal parts of the constitution, but has reserved the right to determine from time to time what parts are fundamental and what ones are formal. In cases decided since 1900, it has held that Congress is not bound by the requirement that taxes shall be uniform throughout the United States, but may impose duties on articles coming from the island dependencies which are different from those collected upon similar articles coming from a foreign country. Similarly, it has held that the requirement of grand and trial juries for the prosecution of crimes is not binding upon Congress when providing for the government of unincorporated territories like Hawaii (before 1900), Puerto Rico, and the Philippines (before 1935). Moreover, it has held that the mere act of annexation does not make the inhabitants of such areas citizens of the United States, but that such citizenship arises only from express grant thereof by Congress.³ The result has been to give Congress a fairly free hand in solving the many special problems arising out of our possession of tropical dependencies inhabited by politically inexperienced peoples—even though most of the rights guaranteed by

¹ J. W. Burgess, "The Decisions in the Insular Cases," *Polit. Sci. Quar.*, XVI, 486-504 (Sept., 1901).

² F. R. Coudert, "The Evolution of the Doctrine of Territorial Incorporation," *Columbia Law Rev.*, XXVI, 823-850 (Nov., 1926).

³ Anon., "Status of Filipinos for Purposes of Immigration and Naturalization," *Harvard Law Rev.*, XLII, 809-812 (Apr., 1929).

the constitution have, in point of fact, been extended sooner or later to the inhabitants of such dependencies.¹

The Government of Alaska and Hawaii

Alaska and Hawaii are at present our only "incorporated," or fully organized, territories.² The inhabitants of both are citizens of the United States; and the constitution and all laws of the United States not locally inapplicable are expressly declared to be in effect as elsewhere in the country. In each territory, the present government consists of distinct executive, legislative, and judicial branches. There is a governor, appointed by the president and Senate for a four-year term, and paid out of the national treasury. The legislature consists of a senate and a house of representatives, both elected by direct popular vote. The term of senators is four years; that of members of the house, two years; and legislative sessions are held biennially. The power of the legislature extends to "all rightful subjects of legislation not inconsistent with the constitution and laws of the United States," although a long list of limitations upon legislative action is included in the organic acts. The governor may veto legislative measures, which are subject also to disallowance by Congress. A governor's veto can, however, be overcome by a two-thirds vote in both houses. Each territory is represented in the lower branch of Congress by an elected delegate, who may speak and serve on committees, but not vote. The right to take part in choosing the territorial delegate and the members of the legislature has been granted to all citizens of the United States, twenty-one years of age, who are bona fide residents and who are able to read and write English (or, in Hawaii, Hawaiian).

Execu-
tive and
legisla-
tive ar-
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ments

Judicial power in Alaska is exercised by a federal district court, organized in four divisions. In Hawaii, there are two sets of courts, territorial and federal. The territorial courts correspond rather closely to our state courts, and include a supreme court, circuit courts, and such inferior courts as the legislature may from time to time create. The supreme court consists of a chief justice and two associate justices, all of whom must be citizens of Hawaii. They, and the judges of the circuit courts also, are appointed by the president and Senate for four-year

Judicial
organiza-
tion

¹ Until a decade ago, the supervision of colonial affairs was not intrusted to a single executive department, as in most European countries, but was divided among the Navy Department, the War Department, and the Department of the Interior; and to a slight extent this division continues. At the present time (1945), however, the Interior Department's Division of Territories and Island Possessions has supervision over Puerto Rico, Alaska, Hawaii, the Virgin Islands, Howland, Jarvis, Baker, Canton, and Enderbury Islands, and over Antarctica; also a limited supervision (interrupted by the Japanese conquest of 1941-42) over the Philippine Islands. On the other hand, Guam, American Samoa, Wake, Midway, and some other minor possessions continue under supervision of the Navy Department (after a brief period in Japanese hands in some cases); and supervision of the Panama Canal Zone remains in the War Department.

² Between the date of annexation (1898) and the enactment of the organic law of 1900, Hawaii was an unincorporated territory.

terms, unless sooner removed by the president. Besides these territorial courts, there is a federal district court consisting of two judges, a district attorney, and a marshal—all appointed by the president and Senate for six-year terms, unless sooner removed by the president.¹

The ques-
tion of
statehood

Both Alaska and Hawaii are potential new states. With a population of 72,524 in 1940, and with steady growth assured—especially as a result of the building of the Alaska-Canada Highway for war purposes in 1942²—the former will soon be at least as populous as Nevada; and the fact that nearly all of the inhabitants are former residents of the United States or descendants of such will lend force to any concerted demand for statehood that may presently be made. In Hawaii, indeed, there was, before the present war, a fairly strong demand of the kind; and a congressional committee studying the question on the spot in 1938 reported favorably.³ Moreover, a local referendum two years later brought out a vote of two to one for statehood. Even under peacetime conditions, a main obstacle was, however, the fact that, with the Islands constituting our primary fortress of defense in the Pacific, more than one-third of their population (423,530 in 1940) was Japanese. What the after-war bearing of this situation will be cannot as yet be discerned, although it is likely to be minimized by the demonstrated loyalty of no small part of the Japanese inhabitants to the United States. It may be added that both the Republican and Democratic national platforms of 1944 endorsed the idea of eventual statehood for Hawaii and Alaska alike.⁴

to

The Government of Puerto Rico

Citizen-
ship and
civil
rights

The most important of our "unincorporated" territories today is Puerto Rico,⁵ whose government is based on organic acts passed by Congress in 1900 and 1917⁶—the second measure extending United States

¹ *Code of the Laws of the U. S.* (1934), 2101-2161. United States courts in the territories are, of course, "legislative" courts (see p. 477 above).

² V. H. Jorgensen, "Our New Land and Air Route to Alaska," *Sat. Eve. Post*, CCXV, 16 ff. (Nov. 7, 1942).

³ See Hawaii Joint Committee, *Hearings*, 75th Cong., 2nd Sess. (1938). Cf. W. Matheson, "Hawaii Pleads for Statehood," *No. Amer. Rev.*, CCXLVII, 130-141 (Spring, 1939).

⁴ C. H. Coggins, "The Japanese Americans in Hawaii," *Harper's Mag.*, CLXXXVII, 75-83 (June, 1943). Immediately after the attack upon Pearl Harbor in December, 1941, martial law was proclaimed in the Islands, with civilian authorities succeeded by military. In March, 1943, eighteen stipulated functions of government were returned to civilian hands, yet with qualified martial law remaining in effect and the privilege of the writ of *habeas corpus* continuing suspended. Finally, in October, 1944, martial law was terminated and the privilege of *habeas corpus* revived. See R. S. Rankin, "Hawaii Under Martial Law," *Jour. of Politics*, V, 270-290 (Aug., 1943), and "Martial Law and the Writ of *Habeas Corpus* in Hawaii," *ibid.*, VI, 213-229 (May, 1944).

⁵ Although with some of the characteristics also of an incorporated territory. The name of the island, formerly Porto Rico, was changed to Puerto Rico by act of Congress in May, 1932. Down to the establishment of the Philippine Commonwealth in 1935, the Philippines also belonged in the "unincorporated" category. From this status, they moved, however, not toward incorporation, but in the direction of independence.

⁶ *Code of the Laws of the U. S.* (1934), 2161-2173.

citizenship to the residents of the island, and also including a bill of rights covering almost all of the points in the first eight amendments to the federal constitution, with the omission of trial by jury¹ and indictment by grand jury. Most statutory laws of the United States not locally inapplicable have the same force and effect as in the United States proper; and a resident commissioner, corresponding to the territorial delegates from Alaska and Hawaii, is elected by the people every four years to represent them in the House of Representatives at Washington, although, like other territorial representatives, without any vote.

"Supreme executive power" is vested in a governor, appointed by the president and Senate, and holding office during the president's pleasure. Seven executive departments were created in 1931, each with a commissioner at its head. The attorney-general and the commissioner of education are appointed by the president and Senate for four years, unless sooner removed by the president; the heads of the other departments are appointed by the governor and senate of Puerto Rico for four years, unless sooner removed by the governor; and the seven department heads collectively form an executive council.²

The executive

The Puerto Rican legislature is much like the Hawaiian. The senate consists of nineteen members elected by popular vote for a four-year term; each of seven districts elects two senators, and five others are chosen at large. The house of representatives consists of thirty-nine members elected every four years, thirty-five of them chosen from single-member districts and four at large. In electing the senators and representatives chosen at large, each voter is permitted to vote for only one candidate for the senate and house, respectively. Voting qualifications are, for the most part, left by the organic acts to be prescribed by the local legislature, subject to the provision that "no property qualification shall ever be imposed upon or required of any voter." Citizens of the United States who have resided in the island at least one year, and are twenty-one years of age, are voters; and since 1932, women have been included in the electorate. Legislative sessions are held annually; and special sessions of the senate, or of both houses, may be called by the governor.

The legislature

General legislative powers were conferred on the Puerto Rican legislature in 1917 in substantially the same language as in the organic laws of Alaska and Hawaii, though in the case of Puerto Rico, legislative organization and procedure are regulated in much greater detail than in either of the other territories mentioned. A bill vetoed by the governor may be repassed by a two-thirds vote of both houses; and in case the governor still withholds his approval, it is transmitted to the president at Washington, who is given ninety days, in which to signify his approval or

¹ *Balzac v Porto Rico*, 258 U. S 298 (1922).

² Until 1917, the council, somewhat differently constituted, formed the upper branch of the territorial legislature.

disapproval—inaction on his part being tantamount to approval. All measures passed by the insular legislature must, indeed, be submitted to the president; all are subject likewise to disallowance by Congress.

the judicial

As in Hawaii, there are two kinds of courts, territorial and federal. At the head of the former stands the supreme court, composed of five justices appointed by the president and Senate for life or good behavior. Below it are seven district courts, each presided over by a single judge appointed by the governor and senate for four years. Finally, there are thirty-four "municipal" courts, in as many judicial districts, with limited jurisdiction in civil and criminal cases. Besides these territorial courts, there is a federal district court with one judge, a district attorney, and a marshal, all of whom are appointed by the president and Senate for four years, unless sooner removed.¹

*The Philippine Islands Receive Deferred Independence*²

earlier arrangements for government

For nearly three years after the United States unexpectedly acquired the Philippines from Spain, the Islands had only a military government under the direction of the president. In 1901, however, Congress authorized the establishment of a temporary civil government; and in the following year an organic law gave the new possessions a modest start on the road to governing themselves. Finally, in 1916, a Philippine Government Act³—commonly known as the Jones Act—broadened the suf-

¹ As in Hawaii, a movement for statehood has developed; and not only has the legislature since 1934 repeatedly petitioned Congress on the subject, but in both 1940 and 1944 the platforms of Republican and Democratic parties (in the United States) alike declared for such statehood eventually. There has been strong demand in the island also, pending statehood, for popular election of the governor; and in 1942 President Roosevelt announced that this privilege would be extended in 1944, or, if the war should then still be in progress, promptly after its end. Requesting Congress in 1943 to give early consideration to popular election of the governor and to redefining the respective functions and powers of the federal and insular governments, the President at the same time appointed a committee consisting of Secretary of the Interior Ickes and an equal number of insular and continental residents to advise concerning changes in the organic law. At the date of writing (1945), no action had resulted; although there continued to be insular dissatisfaction with the policies of the presidentially appointed governor, Rexford G. Tugwell. See B. Pagan, *Puerto Rico: The Next State* (Washington, 1942); J. Polk, "The Plight of Puerto Rico," *Polit. Sci. Quar.*, LVII, 481-503 (Dec., 1942); E. S. Pomeroy, "Election of Governor in Puerto Rico," *Southwestern Soc. Sci. Quar.*, XXIII, 355-360 (Mar., 1943); S. B. Heath, "Our American Slum, Puerto Rico," *Harper's Mag.*, CLXXXVII, 56-83 (June, 1943). The fundamental difficulty with the island economically is that it has a population beyond its capacity to support and therefore apparently condemned to chronic poverty; while obstacles to political assimilation arise from the language being Spanish and the cultural background Latin.

² On December 10, 1941—three days after the assault upon Pearl Harbor, Japanese armed forces made their first landing on Philippine soil; and by May, 1942, conquest was to all intents and purposes complete. At the date of writing (April, 1945), liberation of the Islands from the yoke of the invader was well advanced, and, officially, civil administration had very recently been turned over by General Douglas MacArthur to President Sergio Osmeña and a cabinet of eight members, the direct and legal successor to the Quezon government. Political and economic rehabilitation, however, remained for the future, and for present purposes the affairs of the Islands must be dealt with largely in terms of the status arrived at before the period of subjugation.

³ 39 U. S. Stat. at Large, 545.

frage, introduced a legislature of two elective houses, and otherwise provided for a system of insular government which lasted until 1935, and under which self-government was so far attained that by the date mentioned less than three per cent of public officials, of all grades, were other than Filipinos.¹

When assenting to the treaty provisions annexing the Islands in 1898, the Senate indicated that the new possessions were not necessarily being acquired permanently; and in the Islands themselves independence early became an objective to which all political elements fervently subscribed. For upwards of two decades, the United States remained non-committal on the subject. The Jones Act of 1916, however, announced the country's intention to give the Islands their freedom as soon as "a stable government" could be established therein; and at once the matter became a political issue. The measure referred to was the work of a Democratic president and Congress, and in its platform of the same year the party endorsed the principle of "ultimate independence." On their part, the Republicans denounced the Democratic attitude, asserting that the American task in the Islands was only "half done" and talk of independence premature; and the positions thus taken were reiterated in 1920 and 1924, even though without stirring a great deal of interest among the voters. Encouraged by the promise of the Jones Act and by the repeated Democratic declarations, political leaders in the Islands redoubled their efforts, delegation after delegation being dispatched to Washington by the insular legislature in quest of a grant of "immediate, absolute, and complete independence." For the most part, however, the appeal fell upon deaf ears—until the congressional session of 1929-30, when the self-interest of certain American agricultural and labor groups suddenly injected the question into committee hearings incident to the Hawley-Smoot Tariff Act of 1930.

For more than two decades, Philippine sugar, tobacco, cocoanut oil, cordage, and other products had been admitted into the United States in unrestricted quantities and duty-free. But American producers of such commodities now came forward contending that such favored treatment for the Islands was injuring American industries, and demanding repeal of the law under which it was guaranteed. Indeed, they went farther and advocated an early grant of independence to the Islands, in order that

¹ Without discussion of the points, we may observe that possession of the Philippines has affected the interests and policies of the United States in the following principal ways: (1) coming at a time when our position in the Far East was at a low ebb, the annexation made us thereafter a weightier Far Eastern power; (2) desire for safety of the Islands led us a good many times before 1941 deliberately to shape our course so as to avoid offending Japanese susceptibilities; (3) by 1940, the Islands ranked fifth as a buyer of American goods and about the same as a source of our imports; (4) approximately a quarter of our total investments in the Far East have been in the Islands; (5) prior to 1935, the Islands furnished a rising proportion of our immigrants, thereby giving us a new Oriental immigration problem; (6) the Islands have had a vital place in our sea-power in the Pacific and, of course, (7) their deliverance from the Japanese has supplied a major objective in our war in the Pacific since 1941.

The movement for independence

American "pressure groups" work for independence

the tariff rates applicable to commodities from foreign countries might be brought into play to terminate the competition of insular products; and the plea was seconded vigorously by organized labor, chiefly out of dislike for the immigration of Filipino workers into the country. Various bills providing for early independence failed, however, in the Seventy-first Congress (1929-31); and in the tariff act of 1930 the duty-free provisions were retained.

The
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1933

Undismayed, the pressure groups returned to the battle; and during the congressional session of 1932-33 their efforts met with success. Despite the outspoken opposition of four members of President Hoover's cabinet, and in the face of a forceful presidential veto message declaring that the measure would project the Islands into "economic chaos," the Hare-Hawes-Cutting Bill, providing for complete independence of the Islands after a ten-year period of political and economic readjustment, became law in January, 1933.¹ The act, however, was not to go into effect unless its terms were accepted within a year by the Philippine legislature or by a specially chosen convention.

The Inde-
pendence
act of
1934

Passage of the independence law became the signal for the outbreak of a heated controversy among the Filipinos. One element favored acceptance of the qualified grant of independence contained in it as the most generous concession that could reasonably be expected. Another, clinging to the formula of "immediate, absolute, and complete" independence, favored outright rejection of the offer, in the hope of eventually obtaining better terms. After a long and acrimonious struggle, the insular legislature decided against the measure, at the same time sending off to Washington a new commission charged with working for independence on a more satisfactory basis. President Roosevelt's support was enlisted, and, in response to a special message from him, Congress, in 1934, passed the McDuffie-Tydings Bill, now known as the Philippine Independence Act²—a measure which, in point of fact, was substantially a reenactment of the law of the preceding year, with only two or three slight changes. The latter proved sufficient, however, to appease the Filipino leaders; and on May 1, 1934, the anniversary of Admiral Dewey's victory in Manila Bay, the insular legislature unanimously accepted the arrangements offered.

The Phil-
ippine
Common-
wealth
begins

This done, the legislature arranged for an early election of delegates to a convention to draft a constitution for the Islands. The assembly completed its labors in February, 1935, and a month later the new fundamental law received President Roosevelt's approval; whereupon May 14 was designated by the insular legislature for a popular vote upon the new form of government. With women participating, the decision was for ratification, by the heavy margin of 438,000 to 11,000. The American governor-general thereupon issued a proclamation setting a date for the

¹ 47 U. S. Stat. at Large, 761.

² 48 U. S. Stat. at Large, 456.

election of officers; in due time, the President issued a proclamation announcing the results; and on November 15, 1935, the new government of the Philippine Commonwealth began exercising its powers and functions.

The Philippine Commonwealth—Status and Outlook

With the launching of the Commonwealth, the Islands entered upon a ten-year period of political and economic readjustment, preparatory to full independence. During this transitional period, they were to enjoy far greater autonomy than before, yet with plenty of strings attached. They were to remain part of the United States, even though no longer termed an "insular possession"; their citizens owed allegiance as previously; they could change their constitution only with the consent of the president of the United States—now represented in the Islands by a high commissioner in lieu of the former governor-general.¹ Moreover, all measures passed by the Commonwealth legislature must be reported to Congress, and certain of them were subject to the president's absolute veto;² the president, under certain circumstances, might suspend the operation of any Commonwealth law, contract, or executive order; the United States Supreme Court continued to review cases carried to it from the Philippine supreme court; Philippine foreign relations remained under the "direct supervision and control" of the United States; the United States continued to garrison military posts in the Islands, with authority to call into service all military forces organized by the Commonwealth government;³ and finally, the United States might at any time intervene in the Commonwealth's affairs with a view to preserving the system of government, protecting life, property, and individual liberty, or insuring the discharge of the Commonwealth's obligations.

In its economic aspect, the status assigned the Commonwealth during the transitional period clearly reflected the motivations, on the American side, chiefly inspiring the Independence Act. In line with the demands of labor, Filipino immigration into the United States was limited to fifty newcomers a year; while instead of being admitted duty-free in unlimited quantities, specified Philippine commodities—chiefly sugar, tobacco, cocoanut oil, and hempen products—were admitted free only within specified quotas, all excesses being subject to the same duties as if coming from a foreign country.⁴ Subject to revision annually, the quotas agreed

The ten
year
transi-
tional
period:

1. Political
status

2. Economic
relations

¹ Under the Jones Act, the Islands were represented in the House of Representatives at Washington by two resident commissioners (without votes), chosen by the insular legislature for three-year terms. After 1935, there was but one such commissioner, appointed by the president of the Commonwealth.

² Acts affecting currency, coinage, imports, exports, and immigration.

³ This, of course, was done when the Japanese invaded the Islands in December, 1941.

⁴ The Commonwealth also was required, during the last five years of the period, to impose an export tax on commodities shipped to the United States, starting at five per cent of the rate collected on like articles imported by the United States from foreign countries and rising to twenty-five per cent in the last year, the proceeds to be applied to paying the principal and interest on the bonded debt of the Islands.

upon were, down to 1941, generally large enough to include substantially all of the respective products imported from the Islands. If, however, with the transitional period ended, the quota system were to be terminated, the pinch would come; for the entire Philippine economy had for almost forty years been based on preferential treatment in the American market. When, therefore, in 1937, the late President Manuel L. Quezon proposed that the date of independence be advanced to 1938 or 1939, action was deferred until a Joint Preparatory Commission, half named by the State Department and half by the Philippine chief executive, could inquire minutely into the effect that such a step (or indeed independence at any time) would have upon insular economic interests. Reporting in the spring of 1938, the Commission advised against the suggested change of date, and also recommended that, instead of being terminated abruptly in 1946, trade preferences then existing be tapered off gradually over a period extending to 1960. A "cushioning" bill to this effect, warmly supported by President Roosevelt, failed to become law, but the trade situation for the remainder of the ten-year period was somewhat eased by minor readjustments.

status if
and when
de-
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is
attained

Under terms of the Independence Act, the Islands were automatically to become independent in 1946, the Commonwealth thereupon emerging as "a separate and self-governing nation." The United States was to be entitled to negotiate with the government of the new Philippine Republic for the retention of "naval reservations and fueling stations" in the Islands; but all military forces were to be withdrawn and all governmental connections severed—one final obligation on our part being to negotiate with foreign powers for the Islands' perpetual neutralization. Even before the Japanese conquest of 1941-42, however, a good deal of doubt had arisen as to whether the independence program would actually be carried out according to schedule, and even as to whether, when the time for independence should come, the Filipino people would really want to be cast loose. To be sure, the prospect of economic disaster for the Islands had been somewhat relieved by the probability of eventual legislation prolonging some degree of trade preference for a substantial period after 1946. But the critical international situation in the Far East created by Japanese aggressions had raised pointedly the question of what the fate of the Islands would be if they should be set at liberty; and the likelihood of their being overrun, if not subjugated outright, by the Japanese not only gave rise to much sentiment in the United States favorable to a reconsideration of the whole matter, but perceptibly cooled the enthusiasm of the Filipinos themselves. Better than full independence, concluded a good many people on both sides of the Pacific, would be some arrangement for autonomy, similar

most of which is held by Americans. In 1939, the requirement was so shifted that the tax would, instead, be collected by the United States on imports; but the burden on insular trade remained the same.

to that enjoyed by Canada and Australia in the British Commonwealth of Nations. To this, however, it was instantly objected that if the United States were to continue responsible for the Islands internationally, our government must, in turn, be assured of some effective control over insular domestic affairs.

When the Japanese blow fell, in December, 1941, no conclusions had been arrived at. One result, however, was to stir admiration for the valiant, even though unavailing, efforts of the Filipinos to defend their homeland, along with determination that the Islands should eventually be rescued from their plight. Another effect was to stimulate in official circles in Washington a readiness to see the experience result in independence for the Islands as soon as liberated, without regard to the time-table laid down in the McDuffie-Tydings Act. Three weeks after Pearl Harbor, President Roosevelt said: "I give to the people of the Philippines my solemn pledge that their freedom will be redeemed and their independence established and protected. The entire resources, in men and materials, of the United States stand behind that pledge"; and to a request by him in October, 1943, for authority to proclaim the legal independence of the Islands "as soon as possible," i.e., as soon as the Japanese were expelled and orderly and free processes of self-government were restored, rather than according to schedule in 1946, Congress, in June, 1944, replied favorably, stipulating only that after independence the United States should have a right to retain land, naval, and air bases and fuelling stations in the Islands.¹

The pos-
war out-
look—
inde-
pendent
pledged

As indicated in a footnote above, the liberation of the Islands from Japanese rule was so far advanced at the date of writing (April, 1945) that it had become possible for General MacArthur to turn over the responsibility for civil administration to President Osmeña and his cabinet, although, with the reconquest still to be completed, full control of affairs by these and other Filipino authorities manifestly could be regained only by stages. Recovery of such mastery, however, was confidently expected to be only a matter of months, and already plans had been formed for the Congress extant when the Japanese invaded the Islands to resume functioning, and for a new Congress to be elected in the following November. Asserting the willingness of the Commonwealth to assure the United States the desired bases in the Islands, President Osmeña affirmed the desire of his people to attain their independence as soon as the military situation would permit; and the presumption was that, acting under the authority granted by the United States Congress, President Truman would proclaim such independence probably before the end of 1945, and almost certainly before the end of 1946—which, after all, would bring the Islands their promised new status at substantially the time when they were to have received it in any case under the provisions of the McDuffie-Tydings Act. Of course, nothing was clearer

¹ 53 U. S. Stat. at Large, 1226.

than that legal independence would not mean immediate cessation of American connections with, and activities in, the Islands. Quite apart from the naval, air, and other bases to be arranged for by negotiation, there would be the urgent matter of American assistance in, and perhaps to some extent supervision of, the restoration of the Islands, economically and otherwise, after more than three years of Japanese devastation and exploitation; and with this task in view Congress, in 1944, passed a joint resolution setting up a Philippine Rehabilitation Commission, consisting of nine Americans and nine Filipinos, and charged with investigating all matters affecting postwar economy, trade, finance, and rehabilitation of the Islands, and with recommending measures to be taken, including proposals concerning trade relations after insular independence shall have become a reality. The work of this agency promised to stretch through a number of years; and, altogether, the chances were that the United States would continue to have a "Philippine problem," in some form, for a good while to come.

The Philippine Commonwealth—System of Government

The principal organ of government under the Commonwealth constitution (as considerably amended in 1940) is the Congress of the Philippines, a bicameral body consisting of a senate and a house of representatives.¹ The former contains twenty-four members elected at large for six-year terms, one-third being chosen, like our own senators, every two years. The house of representatives is composed of not to exceed 120 members (actually while in operation, ninety-eight), elected by popular vote for four-year terms,² and apportioned among the several provinces according to population, with at least one representative from each province.³ Regular sessions of the Congress are required to be held annually; and the authority conferred upon it makes it one of the strongest legislative bodies of our time.

The chief executive is a president chosen by direct popular vote for a four-year term; but no person may serve as president for more than eight consecutive years.⁴ A vice-president is chosen also in the same manner. The president is required to prepare the annual budget and

¹ Prior to 1940, the legislature was a unicameral National Assembly, with members elected for three-year terms.

The system of government here described is that in operation in 1941 and now (1945) in process of restoration. Connections of the American president and Congress with the system would, of course, terminate with the establishment of insular independence.

² Since 1937, women have had the suffrage.

³ For purposes of local government, there are thirty-nine provinces with an elective governor, and four provinces with governors appointed by the bureau of non-Christian tribes.

⁴ President Manuel L. Quezon's second term would have ended in November, 1943, had not the Congress of the United States passed a resolution authorizing him to continue in office "until the enemy is driven from the land . . . and until the Filipino people can reconstitute their government as they desire." Dying in Washington in 1944, he was succeeded by Sergio Osmeña.

submit it to the Congress; and it is interesting to observe that, in contrast with the situation in the United States, that body may not increase appropriations recommended by the president, except those for the support of the legislative and judicial branches of the government. The president may veto acts of the Congress, including—again it is interesting to observe—separate items in appropriation, revenue, or tariff bills.¹ A veto may, however, be overridden by a two-thirds vote (in certain instances, only by a three-fourths vote) of all the members of each branch of the Congress. Within limits imposed by the Congress, the president is empowered to fix tariff rates, import and export quotas, and tonnage and wharfage dues.² With the concurrence of two-thirds of all members of the senate, and with the approval of the president of the United States, he may make treaties; and in time of war or other national emergency, the Congress may authorize him, for a limited period and subject to restrictions imposed, "to promulgate rules and regulations to carry out a declared national policy."³ The president also has extensive appointing power, including the selection of heads of departments, judges, and officers of the army and navy. Appointments, however, are subject to approval by a commission of twenty-four members drawn equally from the two branches of the Congress.⁴ Heads of departments may appear before, and be heard by, either branch of the Congress on any matter pertaining to their respective departments.

Judicial power is vested in a supreme court and in such inferior courts as may be established by law;⁵ all judges are appointed by the president, with approval of the commission on appointments; and all hold office during good behavior or until they reach the age of seventy. The supreme court consists of a chief justice and six associate justices; and in order to preclude controversy over judicial review, the court is expressly empowered to declare laws and treaties unconstitutional, provided five of the seven justices concur.⁶

The
judiciary

¹ As pointed out above, certain acts of the insular Congress may likewise be vetoed by the president of the United States, although the power is very rarely exercised.

² The insular president is required also to make annual reports to the president of the United States on "the proceedings and operations of the government of the Commonwealth," and such other reports as the latter official may request.

³ Taking advantage of this provision, the National Assembly, in August, 1940, passed an emergency-power bill conferring upon President Quezon a volume of authority unequalled anywhere outside of the totalitarian countries; absolute control, indeed, over every branch of public and private enterprise was conferred up to the close of the next session of the Assembly (later Congress). The action was taken in the well-justified belief that the Islands faced a severe crisis because of world-wide, and especially Far Eastern, conditions.

⁴ Under a constitutional amendment of 1940, the commission on appointments consists of twelve senators and an equal number of representatives, elected by the two houses, respectively, with the president of the senate *ex officio* chairman without a vote except in case of a tie.

⁵ The existing tribunals include a supreme court, a court of appeals, a court of first instance in each of twenty-odd judicial districts, justices of the peace in every municipality, and a magistrate in every organized town.

⁶ The constitution contains the usual guarantees of civil liberty, various features of the American bill of rights appearing in as many as twenty-one of its clauses.

The Government of Minor Dependencies

1. The
Virgin
Islands

Acquired from Denmark by purchase in 1917 as a move to forestall possible annexation by Germany, the Virgin Islands¹ (in the Lesser Antilles) remained under immediate control of the president until 1936, when an organic act passed by Congress extended to their 22,000 inhabitants (now about 25,000) a liberal measure of home rule.² The insular legislature consists of the popularly elected municipal councils of (a) St. Croix and (b) St. Thomas and St. John, sitting jointly;³ executive power is vested in a governor appointed by the president and Senate for an indefinite term, and reporting to the secretary of the interior at Washington; and the judiciary consists of a district court, together with such inferior courts as may be established by law. Measures may be enacted by the legislature only by two-thirds vote, and any which the governor refuses to approve must be transmitted to the president, who has three months in which to take action on them; all measures, too, enacted by either a municipal council or the legislative assembly are required to be reported to, and are subject to disallowance by, Congress.⁴

2. The
Panama
Canal
Zone

The Panama Canal Zone comprises a strip of territory five miles wide on each side of the Canal, leased in perpetuity from the republic of Panama in 1902, and with a population in 1940 of 51,827. During construction of the waterway, the Zone was governed by the president, acting through a commission appointed under authorization by Congress. When, however, the work neared completion, Congress, in 1913, authorized the president to discontinue the commission and to govern the Zone through a governor and such other officials as might prove necessary.⁵ A "governor of the Panama Canal," appointed by the president and Senate for four years, now administers the affairs of the Zone under supervision of the secretary of war. In the absence of a local legislature, such laws as operate within the area either are made by Congress or take the form of presidential orders. Provision has been made by law for the establishment of organized towns, and for a system of courts beginning with magistrates' courts corresponding to justices of the peace elsewhere. A district court, sitting in two divisions, has original jurisdiction in all felony, and in more important civil, cases, and in equity, and also has the admiralty jurisdiction of a federal district court.⁶

¹ The fifty-odd islands and islets have a combined area of 140 square miles.

² 49 *U. S. Stat. at Large*, 1807.

³ American citizenship was conferred upon the inhabitants of the Islands by act of Congress in 1927; and all American citizens residing in the Islands who are twenty-one years of age and can read and write the English language are entitled to vote.

⁴ R. G. W., "Rehabilitation of the Virgin Islands," *Foreign Affairs*, XVII, 799-804 (July, 1939).

⁵ *Code of the Laws of the U. S.* (1934), pp. 2189-2202.

⁶ D. H. Smith, *The Panama Canal; Its History, Activities, and Organization* (Baltimore, 1927); N. J. Padelford, *The Panama Canal in Peace and War* (New York, 1932).

Until brought into the limelight by the war in the Pacific beginning in 1941, the smallest of our island possessions—Guam, Samoa, Wake, Midway, Jarvis, Baker, Howland (all located in the Mid-Pacific)—were, for the average American, hardly more than names on the map, if even that.¹ In none of them has civil government as yet been introduced; in fact, until rather recently, only Guam and Samoa have been inhabited. Guam, in the Marianas, was ceded to the United States by Spain in 1898. Its status has never been fixed by Congress, and the president has governed the island through an officer of the Navy, assisted by American and native officials.² American Samoa became a protectorate of the United States by virtue of an Anglo-German-American agreement in 1899. In 1900 and 1904, it was ceded to the United States by native chieftains, but not until 1929 did the cession receive congressional acceptance and ratification. During that long period, Congress failed to make any provision for the government of the islands, leaving the president to administer them through an officer of the Navy, who has ruled under laws based on the customs of the people, the laws of the United States, and the common law of England. The inhabitants of Samoa, like those of Guam, are not citizens of the United States.

3. The
Mid-
Pacific
islands

With the development of trans-Pacific aviation, the other islands mentioned (often called the Guano Islands) acquired, even before the war, a new value apart from their guano supplies. Midway, Wake, and Guam are on the direct air route from Honolulu to Manila; Howland and Baker, on the route from Hawaii to Australia; and Jarvis, Samoa, Canton, and Enderbury, on the way to New Zealand. In recognition of the islands' new importance, the Department of Commerce, and later the Department of the Interior, some years ago established small colonizing groups on them; and Congress voted modest appropriations for maintaining and improving them as landing ports for American aviators. All may be expected to have increased importance under future American defense and commercial policies in the Pacific.³

In the later thirties, the war in Europe, and especially Japan's projected "new order" for Eastern Asia, threw our territories and dependencies into bold relief as points of vital significance for national defense; and our own war with Japan turned them into a main theater of action.

National
defense
and the
terri-
toles
and de-
pend-
encies

¹ At the date of writing (1945), certain of these possessions, notably Guam, had but lately been recovered from the Japanese. For the present, they can be dealt with only as they were before their recent wartime experience.

² L. Thompson, *Guam and Its People* (New York, 1941).

³ Canton and Enderbury Islands, in the Phoenix group in the Central Pacific, have been claimed by both Great Britain and the United States. In April, 1939, the governments of the two countries reached an agreement, however, for a system of joint control and administration for a period of fifty years. Except for the few colonists referred to, the islands are uninhabited.

On the general subject of American islands in the Pacific, see C. H. Gratton, "Our Unknown Pacific Islands," *Harper's Mag.*, CLXXXII, 523-532 (Apr., 1941); D. N. Leff, *Uncle Sam's Pacific Islets* (Palo Alto, Calif., 1940); and especially B. Orent and P. Reinsch, "Sovereignty Over Islands in the Pacific," *Amer. Jour. of Internat. Law*, XXXV, 443-461 (July, 1941).

As the situation darkened, Alaska became a potential avenue of invasion by air, and protective Army and Navy bases were by 1941 being rushed to completion.¹ Plans were launched for strengthening the defenses of Puerto Rico in order better to protect the Panama Canal; submarine bases were established in the Virgin Islands; preparedness measures in Hawaii augmented the military and naval defenses of that base of operations for our Pacific fleet; and in Guam, Midway, and Wake Island, the government spent millions for harbor improvements, landings for aircraft, and other defense facilities. In the Far East, the Philippines—promised independence, but as yet American territory—were made more ready, by joint effort of the United States and Commonwealth governments, to resist attack, although even had there been more time, it would hardly have been possible to avert at least partial conquest in a war of such proportions as that unleashed by Japan with her attack at Pearl Harbor in December, 1941.

The territories
in war

When war came, everything west of Midway was lost to the Oriental conqueror. Except for remote points in the Aleutian archipelago (now recovered), Alaska, however, was never invaded; and the great Alaska-Canada Highway constructed in 1942 became an artery along which have flowed vital supplies for the use of our forces in the North Pacific. Much damage was wrought at Pearl Harbor in the attack which touched off the war; but Hawaii was never taken and has served as a major base for our operations in the Central Pacific. The Philippines, of course, were lost, but were being regained in 1945. Guam and Baker Island were recovered in 1944; and at the date of writing (April, 1945) it was clear that not a square foot of the American empire in the Pacific would be permanently lost. Not only so, but thrusting itself forward was the question of whether, with peace restored, that empire should not be extended to include part or all of the far-flung archipelagoes—the Marianas, Marshalls, and Carolines—formerly held by Japan under mandate from the League of Nations, and possibly certain other strategically situated islands, as well, perhaps in the Kuriles, the Bonins, or the Ryukyu chain. An alternative to outright annexation would, of course, be an arrangement under which, while naval and air bases should be acquired outright, insular areas outside of such bases should be taken over only on a basis of "trusteeship," with responsibility to the new international organization for their proper administration; and, after much difference of opinion among the State, War, and Navy Departments, a plan of this nature was agreed upon and prepared for submission to the Allied Nations Conference at San Francisco in April-May, 1945.

¹ V. Stefannson, "Alaska—American Outpost No. 4," *Harper's Mag.*, CLXXXIII, 83-92 (June, 1941).

The Government of the District of Columbia¹

Many national capitals—London, Paris, Berlin, etc.—have systems of government more or less peculiar to themselves. This is true also of the city of Washington—more accurately the District of Columbia, comprising some seventy square miles on the north bank of the Potomac and including Washington and certain of its suburbs—an area for which the constitution confers on Congress the power to “exercise exclusive legislation in all cases whatsoever.”² The District has no local legislature; Congress itself makes all laws, whether pertaining to administrative and judicial organization or to financial, educational, and similar affairs of the area—thus performing the work that usually falls to a city council or a county board. No governor or mayor or other single chief executive presides; on the contrary, since 1878 executive authority has been vested in a commission of three persons, of whom two are appointed by the president and Senate from among the residents of the District for three-year terms, and a third is detailed by the president from the engineer corps of the Army for an indefinite term. As a body, these three commissioners have extensive powers: they appoint to numerous important municipal positions; they have charge of police and fire protection, and make regulations for the safeguarding of life, health, and property; they supervise the local public utilities, including gas, electricity, telephones, transportation, and water supply. Schools are under a board of education appointed by the judges of the supreme court of the District. A board of charities and the judges of a municipal court are appointed by the president. For more than forty years prior to 1920, the cost of the District government was divided equally between the national treasury and the taxpayers of the District. In the year mentioned, the District's quota was moved up to sixty per cent. And in more recent years the federal government's scheduled share has been growing relatively smaller, until in the fiscal years 1940-42 it fell to six million dollars, or less than one-seventh of the total municipal budget. In addition to these regular annual contributions, however, considerable federal sums have been granted for specific purposes, and, all told, federal grants still usually amount to about a fifth of total District revenues. Like some of our state governments, the District collects income taxes, inheritance and estate taxes, incorporation taxes, motor-fuel sales taxes, and unemployment compensation taxes; and, altogether, these “state” taxes brought in about twenty-one per cent of the total revenues in 1941. As in other cities, the major source of municipal income is the general property tax.³

The commission system

¹ The District, of course, is neither a “territory” nor a “dependency”; but a word about its government may most conveniently be inserted at this point.

² Art. I, § 8, cl. 17.

³ Bureau of the Census, *Financial Statistics of Cities: 1941*, “Washington, D. C.” (July 31, 1942). L. B. Sims, “Intergovernmental Fiscal Relations in the Nation's Capital,” *Nat. Mun. Rev.*, XXVI, 223-229 (May, 1937); *Fiscal Relations Between the Federal Government and the Government of the District of Columbia* (Washington,

Many of the half-million residents of the District retain a legal residence in some one of the states and may vote there, usually by mail. In the District itself, however, not even taxpayers are voters; there are no locally elected officers, and the District as such has no part in choosing the president or members of Congress. Notwithstanding this denial of direct popular participation in government, "there is probably no municipal government in this country where the opinion of the individual citizen has more influence on local government." The commissioners and the committees of Congress to which bills relating to District matters are referred hold hearings on every measure of local importance, and any person who desires to express an opinion is certain of consideration; indeed, in 1926 the House committee on the District of Columbia invited a wider expression of popular views by adopting the practice of sending bills to a citizens' advisory council representing numerous local civic organizations. By and large, however, taxation without representation is no better liked by Americans today than when James Otis and Samuel Adams denounced it; and the question of political rights for the inhabitants of the District is likely to be agitated until something practical is done about it.¹

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For upwards of twenty years, one or more proposals to amend the constitution for the assumed benefit of the people of the District have been introduced in every Congress. One suggestion is to permit residents of the District to vote in presidential elections and to elect their own representatives and senators to sit in Congress. Another goes farther and not only contemplates the election of senators and representatives from the District, but would empower Congress to set up a government modeled upon the state governments, with legislative, executive, and judicial branches. The Democratic platform of both 1940 and 1944 advocated extension of the suffrage to the inhabitants of the District.

In 1938, an extended survey of the District government was made by Griffenhagen and Associates, and in February, 1939, an elaborate report was made to Congress in which many changes were recommended. Briefly, the Griffenhagen plan called for scrapping the present commission government and establishing in its place a chief executive officer, called district administrator, with a council to formulate legislative policies, and some seventeen administrative departments. See C. Larson, "The Manager Plan for the Nation's Capital?" *Nat. Mun. Rev.*, XXVIII, 371-373 (May, 1939); G. W. Rutherford, "Reorganization of the Government of the District of Columbia," *Amer. Polit. Sci. Rev.*, XXXIII, 653-655 (Aug., 1939). Cf. M. J. Pusey, "Washington; a National Disgrace," *Forum*, CII, 241-248 (Dec. 1939).

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APPENDIX

THE CONSTITUTION OF THE UNITED STATES OF AMERICA

We, the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

ARTICLE I

SECTION I

All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

SECTION II

The House of Representatives shall be composed of members chosen every second year by the people of the several States, and the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature.

No person shall be a Representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State in which he shall be chosen.

Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years,¹ and excluding Indians not taxed, three fifths of all other persons.² The actual enumeration shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of Representatives shall not exceed one for every thirty thousand, but each State shall have at least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to choose three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.³

When vacancies happen in the representation from any State, the executive authority thereof shall issue writs of election to fill such vacancies.

The House of Representatives shall choose their Speaker and other officers, and shall have the sole power of impeachment.

¹ Altered by the Fourteenth Amendment.

² Rescinded by the Fourteenth Amendment.

³ Temporary provision.

SECTION III .

The Senate of the United States shall be composed of two Senators from each State, chosen by the legislature thereof,¹ for six years; and each Senator shall have one vote.

Immediately after they shall be assembled in consequence of the first election, they shall be divided as equally as may be into three classes. The seats of the Senators of the first class shall be vacated at the expiration of the second year, of the second class at the expiration of the fourth year, and of the third class at the expiration of the sixth year, so that one third may be chosen every second year; and if vacancies happen by resignation or otherwise during the recess of the legislature of any State the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies.²

No person shall be a Senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State for which he shall be chosen.

The Vice-President of the United States shall be President of the Senate, but shall have no vote, unless they be equally divided.

The Senate shall choose their other officers, and also a President *pro tempore* in the absence of the Vice-President, or when he shall exercise the office of the President of the United States.

The Senate shall have the sole power to try all impeachments. When sitting for that purpose, they shall be on oath or affirmation. When the President of the United States is tried, the Chief Justice shall preside; and no person shall be convicted without the concurrence of two thirds of the members present.

Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit under the United States; but the party convicted shall, nevertheless, be liable and subject to indictment, trial, judgment, and punishment, according to law.

SECTION IV

The times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators.

The Congress shall assemble at least once in every year, and such meeting shall be on the first Monday in December, unless they shall by law appoint a different day.³

SECTION V

Each house shall be the judge of the elections, returns, and qualifications of its own members, and a majority of each shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner, and under such penalties, as each house may provide.

¹ Modified by the Seventeenth Amendment.

² Modified by the Seventeenth Amendment.

³ Superseded by the Twentieth Amendment.

Each house may determine the rules of its proceedings, punish its members for disorderly behavior, and with the concurrence of two thirds, expel a member.

Each house shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy, and the yeas and nays of the members of either house on any question shall, at the desire of one fifth of those present, be entered on the journal.

Neither house, during the session of Congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than what in which the two houses shall be sitting.

SECTION VI

The Senators and Representatives shall receive a compensation for their services, to be ascertained by law and paid out of the Treasury of the United States. They shall, in all cases except treason, felony, and breach of the peace, be privileged from arrest during their attendance at the session of their respective houses, and in going to and returning from the same; and for any speech or debate in either house they shall not be questioned in any other place.

No Senator or Representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased, during such time; and no person holding any office under the United States shall be a member of either house during his continuance in office.

SECTION VII

All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other bills.

Every bill which shall have passed the House of Representatives and the Senate shall, before it become a law, be presented to the President of the United States; if he approves he shall sign it, but if not he shall return it, with his objections, to that house in which it shall have originated, who shall enter the objections at large on their journal and proceed to reconsider it. If after such reconsideration two thirds of that house shall agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered, and if approved by two thirds of that house it shall become a law. But in all such cases the votes of both houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the journal of each house respectively. If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the Congress by their adjournment prevent its return, in which case it shall not be a law.

Every order, resolution, or vote to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment) shall be presented to the President of the United States; and before the same shall take effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the rules and limitations prescribed in the case of a bill.

SECTION VIII

The Congress shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States;

To borrow money on the credit of the United States;

To regulate commerce with foreign nations and among the several States, and with the Indian tribes;

To establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States;

To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures;

To provide for the punishment of counterfeiting the securities and current coin of the United States;

To establish post-offices and post-roads;

To promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries;

To constitute tribunals inferior to the Supreme Court;

To define and punish piracies and felonies committed on the high seas and offenses against the law of nations;

To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;

To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years;

To provide and maintain a navy;

To make rules for the government and regulation of the land and naval forces;

To provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions;

To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress;

To exercise exclusive legislation in all cases whatsoever over such district (not exceeding ten miles square) as may, by cession of particular States and the acceptance of Congress, become the seat of the Government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings; and

To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof.

SECTION IX

The migration or importation of such persons as any of the States now existing shall think proper to admit shall not be prohibited by the Congress.

prior to the year one thousand eight hundred and eight, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person.¹

The privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

No bill of attainder or *ex post facto* law shall be passed.

No capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken.

No tax or duty shall be laid on articles exported from any State.

No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another; nor shall vessels bound to or from one State be obliged to enter, clear, or pay duties in another.

No money shall be drawn from the Treasury but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time.

No title of nobility shall be granted by the United States; and no person holding any office of profit or trust under them shall, without the consent of the Congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign State.

SECTION X

No State shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, or grant any title of nobility.

No State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts, laid by any State on imports or exports, shall be for the use of the Treasury of the United States; and all such laws shall be subject to the revision and control of the Congress.

No State shall, without the consent of Congress, lay any duty of tonnage, keep troops or ships of war in time of peace, enter into any agreement or compact with another State or with a foreign power, or engage in war, unless actually invaded or in such imminent danger as will not admit of delay.

ARTICLE II

SECTION I

The executive power shall be vested in a President of the United States of America. He shall hold his office during the term of four years, and together with the Vice-President, chosen for the same term, be elected as follows:

Each State shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress; but no Senator or Representative, or person holding an office of trust or profit under the United States, shall be appointed an elector.

The electors shall meet in their respective States and vote by ballot for two persons, of whom one at least shall not be an inhabitant of the same State with themselves. And they shall make a list of all the persons voted for, and of the number of votes for each; which list they shall sign and certify, and transmit sealed to the seat of government of the United States, directed to the President of the Senate. The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted. The person having the greatest number of votes shall be the President, if such number be a majority of the whole number of electors appointed; and if there be more than one who have such a majority, and have an equal number of votes, then the House of Representatives shall immediately choose by ballot one of them for President; and if no person have a majority, then from the five highest on the list the said House shall in like manner choose the President. But in choosing the President the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two thirds of the States, and a majority of all the States shall be necessary to a choice. In every case, after the choice of the President, the person having the greatest number of votes of the electors shall be the Vice-President. But if there should remain two or more who have equal votes, the Senate shall choose from them by ballot the Vice-President.¹

The Congress may determine the time of choosing the electors and the day on which they shall give their votes, which day shall be the same throughout the United States.

No person except a natural-born citizen, or a citizen of the United States at the time of the adoption of this Constitution, shall be eligible to the office of President; neither shall any person be eligible to that office who shall not have attained to the age of thirty-five years, and been fourteen years a resident within the United States.

In case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the Vice-President, and the Congress may by law provide for the case of removal, death, resignation, or inability, both of the President and Vice-President, declaring what officer shall then act as President, and such officer shall act accordingly until the disability be removed or a President shall be elected.

The President shall, at stated times, receive for his services a compensation, which shall neither be increased nor diminished during the period for which he may have been elected, and he shall not receive within that period any other emolument from the United States or any of them.

Before he enter on the execution of his office he shall take the following oath or affirmation:

"I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will to the best of my ability preserve, protect, and defend the Constitution of the United States."

¹ Superseded by the Twelfth Amendment.

SECTION II

The President shall be commander-in-chief of the army and navy of the United States, and of the militia of the several States when called into the actual service of the United States; he may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices, and he shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment.

He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur; and he shall nominate, and, by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law; but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments.

The President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session.

SECTION III

He shall from time to time give to the Congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient; he may, on extraordinary occasions, convene both houses, or either of them, and in case of disagreement between them with respect to the time of adjournment, he may adjourn them to such time as he shall think proper; he shall receive ambassadors and other public ministers; he shall take care that the laws be faithfully executed, and shall commission all the officers of the United States.

SECTION IV

The President, Vice-President, and all civil officers of the United States shall be removed from office on impeachment for and conviction of treason, bribery, or other high crimes and misdemeanors.

ARTICLE III

SECTION I

The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office.

SECTION II

The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and the treaties made, or which

shall be made, under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State;¹ between citizens of different States; between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign States, citizens, or subjects.

In all cases affecting ambassadors, other public ministers, and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make.

The trial of all crimes, except in cases of impeachment, shall be by jury;² and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed.

SECTION III

Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

The Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood or forfeiture except during the life of the person attainted.

ARTICLE IV

SECTION I

Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.

SECTION II

The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.²

A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime.

No person held to service or labor in one State, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due.³

¹ Restricted by the Eleventh Amendment.

² Extended by the Fourteenth Amendment.

Superseded by the Thirteenth Amendment in so far as pertaining to slaves.

SECTION III

New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the jurisdiction of any other State; nor any State be formed by the junction of two or more States or parts of States, without the consent of the legislatures of the States concerned as well as of the Congress.

The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States or any particular State.

SECTION IV

The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion, and on application of the legislature, or of the executive (when the legislature cannot be convened), against domestic violence.

ARTICLE V

The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two thirds of the several States, shall call a convention for proposing amendments, which in either case shall be valid to all intents and purposes as part of this Constitution, when ratified by the legislatures of three fourths of the several States, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress, provided that no amendments which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article,¹ and that no State, without its consent, shall be deprived of its equal suffrage in the Senate.

ARTICLE VI

All debts contracted and engagements entered into, before the adoption of this Constitution, shall be as valid against the United States under this Constitution as under the confederation.²

This Constitution, and the laws of the United States, which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

The Senators and Representatives before mentioned, and the members of the several State legislatures, and all executive and judicial officers both of the United States and of the several States, shall be bound by oath or affirmation to support this Constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States.

¹ Temporary clause.

² Extended by the Fourteenth Amendment.

ARTICLE VII

The ratification of the conventions of nine States shall be sufficient for the establishment of this Constitution between the States so ratifying the same.

Done in convention by the unanimous consent of the States present, the seventeenth day of September, in the year of our Lord one thousand seven hundred and eighty-seven, and of the independence of the United States of America the twelfth. In witness whereof, we have hereunto subscribed our names.

[Signed by] ¹

ARTICLES IN ADDITION TO, AND AMENDMENT OF, THE CONSTITUTION OF THE UNITED STATES OF AMERICA, PROPOSED BY CONGRESS, AND RATIFIED BY THE LEGISLATURES OF THE SEVERAL STATES [OR CONVENTIONS THEREIN] PURSUANT TO THE FIFTH ARTICLE OF THE ORIGINAL CONSTITUTION:

Article I. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Article II. A well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed.

Article III. No soldier shall, in time of peace, be quartered in any house without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

Article IV. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

Article V. No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Article VI. In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein

¹ The signatures are omitted here.

the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Article VII. In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

Article VIII. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Article IX. The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

Article X.¹ The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Article XI.² The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State.

Article XII.³ The electors shall meet in their respective States and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same State with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President and of all persons voted for as Vice-President, and of the number of votes for each; which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate. The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted. The person having the greatest number of votes for President shall be the President, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the person having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, for as President. But in choosing the President the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two thirds of the States, and a majority of all States shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve

¹ The first ten amendments took effect December 15, 1791.

² Proclaimed January 8, 1798.

³ Proclaimed September 25, 1804.

upon them, before the fourth day of March¹ next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President. *Or natural*

The person having the greatest number of votes as Vice-President shall be the Vice-President, if such number be a majority of the whole number of electors appointed; and if no person have a majority, then from the two highest numbers on the list the Senate shall choose the Vice-President: a quorum for the purpose shall consist of two thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

Article XIII.² *Section 1.* Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

Article XIV.³ *Section 1.* All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the executive and judicial officers of a State, or the members of the legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States or under any State, who, having previously taken an oath as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may, by a vote of two thirds of each house, remove such disability.

Section 4. The validity of the public debt of the United States, authorized

¹ Superseded by the Twentieth Amendment.

² Proclaimed December 18, 1865.

³ Proclaimed July 28, 1868.

by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations, and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Article XV.¹ *Section 1.* The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

Article XVI.² The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

Article XVII.³ The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature.

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: *Provided*, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

Article XVIII.⁴ *Section 1.* After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

Section 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.⁵

Article XIX.⁶ *Section 1.* The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

¹ Proclaimed March 30, 1870.

² Proclaimed February 25, 1913.

³ Proclaimed May 31, 1913.

⁴ Proclaimed January 29, 1919.

⁵ Rescinded by the Twenty-first Amendment.

⁶ Proclaimed August 26, 1920.

Article XX.¹ Section 1. The terms of the President and Vice-President shall end at noon on the 20th day of January, and the terms of Senators and Representatives at noon on the 3rd day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.

Section 2. The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3rd day of January, unless they shall by law appoint a different day.

Section 3. If at the time fixed for the beginning of the term of the President, the President-elect shall have died, the Vice-President-elect shall become President. If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President-elect shall have failed to qualify, then the Vice-President-elect shall act as President until a President shall have qualified, and the Congress may by law provide for the case wherein neither a President-elect nor a Vice-President-elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice-president shall have qualified.

Section 4. The Congress may by law provide for the case of the death of any of the persons from whom the House of Representatives may choose a President whenever the right of choice shall have devolved upon them, and for the case of the death of any of the persons from whom the Senate may choose a Vice-President whenever the right of choice shall have devolved upon them.

Section 5. Sections 1 and 2 shall take effect on the 15th day of October following the ratification of this article.

Section 6. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission.

Article XXI.² Section 1. The Eighteenth article of amendment to the Constitution of the United States is hereby repealed.

Section 2. The transportation or importation into any State, territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

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¹ Proclaimed February 6, 1933.

² Proclaimed December 5, 1933.

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